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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH);
KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA
COMMUNITY ASSOCIATION; HAHAIONE VALLEY
COMMUNITY ASSOCIATION,
Appellants,

vs.

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING,
MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the
Kamehameha Schools/Bishop Estate,
Appellees.

APPENDIX TO JURISDICTIONAL STATEMENT OR
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT FILED BY PORTLOCK COMMUNITY
ASSOCIATION (MAUNALUA BEACH); KOKOHEAD
COMMUNITY LEASE-FEE, INC.; WEST MARINA
COMMUNITY ASSOCIATION; AND HAHAIONE VALLEY
COMMUNITY ASSOCIATION INC.

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ASSOCIATION, INC.; HAHAHIONE VALLEY COMMUNITY ASSOCIATION,
INC.; KAMILOIKI COMMUNITY ASSOCIATION; LUNALILO MARINA
COMMUNITY ASSOCIATION; MARINERS RIDGE AND COVE FEE/LEASE
CONVERSION COMMITTEE; SPINNAKER ISLE ASSOCIATION;
WAIALAE IKI COMMUNITY ASSOCIATION; WAI'AU COMMUNITY
ASSOCIATION; KAHALA COMMUNITY ASSOCIATION, INC.;
KAHALA COMMUNITY FEE PURCHASE FUND and
HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION,
-Intervenors-Appellants,

vs.

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING,
MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the
Kamehameha Schools/Bishop Estate,
Plaintiffs-Appellees.

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Appendix A

Frank E. Midkiff, Richard Lyman, Jr. Hung Wo Ching, Matsuo Takabuki and Myron B. Thompson, Trustees of the Kamehameha Schools/Bishop Estate, Plaintiffs-Appellants,

vs.

Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoshi Tamura, Andrew I.T. Chang, and David C. Slipher, Commissioners of the Hawaii Housing Authority; Franklin Y.K. Sunn, Executive Director of the Hawaii Housing Authority; and Hawaii Housing Authority, Defendants-Appellees,

and

Wai-Kahala Tract "H" Association, Inc.; Halawa Hills Landsale Committee; Awakea Association; Alii Shores Community Association; Enchanted Hills, Unit I; Portlock Community Association (Maunalua Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Association; Kalama Valley Community Association; Maunalua Triangle-Koko Kai Community Association, Inc.; Hahahione Valley Community Association, Inc.; Kamiloiki Community Association; Lunalilo Marina Community Association; Mariners Ridge and Cove Fee/Lease Conversion Committee; Spinnaker Isle Association; Waialae Iki Community Association; Waiau Community Association; Kahala Community Association, Inc.; Kahala Community Fee Purchase Fund and Halawa Valley Estates Fee Conversion Corporation, Intervenor-Appellees.

No. 80-4368.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 21, 1981.

Decided March 28, 1983.

Before ALARCON, POOLE and FERGUSON, Circuit
Judges.

ALARCON, Circuit Judge:

The question presented by this case is whether a state may take real property from a lessor and transfer title in fee simple absolute to a lessee because of a shortage of land for fee simple residential ownership.¹ We hold that such a taking violates the federal constitution.

¹Federal district court jurisdiction of the case sub judice is based upon 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights) & 2201 (declaratory relief) and 42 U.S.C. § 1983 (civil action for deprivation of rights). The issue of whether the district court should abstain from the exercise of its jurisdiction was raised during the proceedings below. The district court proceeded to the merits and thus implicitly exercised its discretion to decline abstention. See *Midkiff v. Tom*, 483 F.Supp. 62 (D.Haw. 1979).

The general rule is that a federal court must decide the cases properly before it; abstention from the exercise of jurisdiction is the exception to the rule. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976); *Shamrock Dev. Co. v. City of Concord*, 656 F.2d 1380, 1385 (9th Cir. 1981). "[T]here is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of state policy." *Zablocki v. Redhail*, 434 U.S. 374, 379-80 n. 5, 98 S.Ct. 673, 677-678 n. 5, 54 L.Ed.2d 618 (1978). This court will reverse the district court on the issue of abstention only where there has been an abuse of discretion. *Shamrock Dev. Co.*, 656 F.2d at 1385.

There are several bases upon which a federal court may abstain from exercising its jurisdiction. See *International Bhd. of Elec. Workers, Local Union No. 1245 v. Public Serv. Comm'n*, 614 F.2d

I

On February 19, 1979, the Trustees of the Kamehameha Schools/Bishop Estate [Bishop Estate] filed a declaratory relief action alleging that the Hawaii Land Reform Act, Hawaii Rev.Stat. ch. 516, was unconstitutional. The Commissioners and the Executive Director of the Hawaii Housing Authority and the Hawaii Housing Authority were named as defendants [original defendants and intervenors hereinafter Appellees]. The district court declared that the challenged statute before us was constitutional. *Midkiff v. Tom*, 483 F.Supp. 62, 70 (D.Haw. 1979). This appeal followed.

The Hawaii Land Reform Act permits certain lessees in possession of land in that state to acquire title in fee simple absolute through eminent domain proceedings. This legislation was enacted after a determination by the Hawaii Legislature that land ownership is concentrated in a few persons who have chosen to lease their property rather than to sell it. The legislature found that this practice has resulted in a shortage of fee simple land and an artificial inflation of residential land values in the state.

206, 211-12 (9th Cir. 1980) [*International Bhd.*]. A federal court may decide to abstain, for example, where a federal constitutional issue could be "mooted or presented in a different posture by a state court determination of pertinent state law." *County of Allegheny v. Frank McShuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959) (citing inter alia *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941)). This court has held that abstention based upon this doctrine (*Pullman* abstention) is required if three tests are met.

- (1) The complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."
- (2) "Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."
- (3) The possibility determinative issue of state law is doubtful.

We must decide whether the Federal Constitution permits a state to take the private property of *A* and transfer its ownership to *B* for his private use and benefit. It is our view that it was the intention of the framers of the Constitution and the fifth amendment that this form of majoritarian tyranny should not occur. The protection provided by the fifth amendment has been extended to the states by reason of the fourteenth amendment. *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 158, 17 S.Ct. 56, 63, 41 L.Ed. 369 (1896).

Canton v. Spokane School Dist. # 81, 498 F.2d 840, 845 (9th Cir. 1974) (citing *Pullman*, 312 U.S. at 498-99, 61 S.Ct. at 644-645) (footnote omitted). A state's system of eminent domain "is intimately involved with sovereign prerogative," *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) (upholding district court's exercise of discretion resulting in abstention), however, this alone is insufficient to require abstention. *Frank Mashuda Co.*, 360 U.S. at 191-92, 79 S.Ct. at 1064-1065; see *Zablocki*, 434 U.S. at 379-80 n. 5, 98 S.Ct. at 677-678 n. 5 (1978); *Pue v. Sillas*, 632 F.2d 74, 78 (9th Cir. 1980). It is especially crucial that there be "an uncertain issue of state law." *Id.* at 78. The Hawaii Land Reform Act is perfectly clear as to the key issue of whether the condemnation system set forth in Hawaii Rev.Stat. ch. 516 is for a public use. The statute unambiguously states: "The use of the power to eminent domain [under the Hawaii Land Reform Act] . . . is for a public use and purpose." Hawaii Rev.Stat. § 516-83(a) (12). Moreover, there is no fair construction of this provision that would moot the federal issue of whether the condemnation is for a public use. "Hence, the naked question, uncomplicated by an unresolved state law, is whether the Act on its face is unconstitutional." *Wisconsin v. Constantineau*, 400 U.S. 433, 439, 91 S.Ct. 507, 511, 27 L.Ed.2d 515 (1971). Abstention by the district court thus would have been inappropriate.

Federal courts may also decline to exercise their jurisdiction where the dispute involves "an essentially local issue arising out of a complicated state regulatory scheme" *International Bhd.*, 614 F.2d at 211. See *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). The Ninth Circuit has limited abstention under this principle (*Burford* abstention) to cases where: (1)

II

As originally drafted, the Federal Constitution contained no reference to the protection of private property interests. It is quite clear, however, that prior to the founding of this nation, it was well established that the government could not take private property except for the use of the public. Hugo Grotius, one of the first commentators to define eminent domain, articulated a "public advantage" as

the state has concentrated suits involving the local issue in a particular court; and (2) the federal issues are not easily separable from state law issues with which the state courts may have special competence. See *International Bhd.*, 614 F.2d at 211. Hawaii has not concentrated challenges to its condemnation system in any court. The federal issue of whether the takings provided for by the state legislature is for a public use is easily separable from any state law issues especially since the statute is clear. *Burford* abstention is thus inapplicable.

Finally, abstention by a federal district court is appropriate under the principles of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Younger* and its progeny counsel federal court abstention when there is a pending or ongoing state proceeding. *Moore v. Sims*, 442 U.S. 415, 423, 99 S.Ct. 2371, 2377, 60 L.Ed.2d 994 (1979); *L.H. v. Jamieson*, 643 F.2d 1351, 1352 (9th Cir. 1981), in which the federal claims could be competently adjudicated. See *Moore*, 442 U.S. at 425, 99 S.Ct. at 2378. The Supreme Court recently reiterated that abstention under *Younger* principle is limited to federal cases which "seek to enjoin state judicial proceedings. . . ." *Fair Assessment in Real Estate Ass'n Inc. v. McNary*, 454 U.S. 100, 102 S.Ct. 177, 185, 70 L.Ed.2d 271 (1981). See *Zablocki*, 434 U.S. at 379-80 n. 5, 98 S.Ct. at 677-678 n. 5. Plaintiffs in this action have not sought to enjoin any state judicial proceedings. We are informed by counsel on both sides of the abstention issue that, as of the time this action was filed, no condemnation actions had been filed in the state courts. This fact is undisputed. Moreover, even though such suits may now be pending in the state courts, the "principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court." *Town of Lockport, N.Y. v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 264 n. 8, 97 S.Ct. 1047, 1051 n. 8, 51 L.Ed.2d 313 (1977) (emphasis added). The district court acted correctly in declining to abstain from the exercise of its jurisdiction.

a necessary prerequisite to a taking by the state.² H. Grotius, *De Jure Belli Ac Pacis* 385 (F. Kelly trans. London 1925) (1st ed. Amsterdam 1646). In 1758, E. de Vattel wrote that the exercise of the power of eminent domain had to be for the "public welfare." E. de Vattel, *The Law of Nations*, 96 (C. Fenwick trans. 1916) (1st ed. 1758). S. Pufendorf stated that a government taking must be for the "necessities of the state." *De Jure Naturae et Gentium* 1285 (C. & W. Oldfather trans. London 1934) (1st ed. 1688).

III

The failure to spell out a precise guarantee for the protection of life, liberty, and property interests in the body of the United States Constitution was deliberate. James Madison, considered by historians to be the Father of the Constitution,² explained the reasons for this conscious omission as follows:

My own opinion has always been in favor of a bill of rights At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others I have not viewed it in an important light—1. because . . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude 3. because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other. 4. be-

²United States Constitutional Sequicentennial Comm'n, *History of the Formation of the Union Under the Constitution* 122 (1941).

cause experience proves the inefficacy of a bill of rights on those occasions when its control is most needed . . .

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 *The Writings of James Madison* 271-72 (G. Hunt ed. 1904).

Madison was, however, keenly mindful of the need to create a form of government which would protect each person's property interests. He stated this concern eloquently at the constitutional convention. "In future times a great majority of the people will not only be without landed, but any other sort of, property. These [may] . . . combine under the influence of their common situation; in which case, the rights of property & the public liberty, [will not be secure in their hands] . . ." 2 *The Records of the Federal Convention of 1787* 203-04 (M. Farrand ed. 1911) (footnotes omitted).²

In 1787 Madison expressed his views to Thomas Jefferson concerning the need to protect minority rights from the acts of a majority that might seek to remedy unequal property distribution through legislative action:

[N]o society ever did or can consist of [a] . . . homogeneous . . . mass of Citizens. . . . In all civilized societies, distinctions are various and unavoidable. A distinction of property results from that very protection which a free Government gives to unequal faculties of acquiring it. There will be rich and poor; creditors and debtors; a landed interest, a monied interest, a mercantile interest, a manufacturing interest. . . . [These distinctions will produce dissention and fac-

²Madison also articulated this concept earlier during the constitutional convention: "The lesson we are to draw . . . is that where majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure." 1 *The Records of the Federal Convention of 1787*, 136 (M. Farrand ed. 1911).

tion.] However erroneous or ridiculous these grounds of dissention and faction may appear to the enlightened Statesman or the benevolent philosopher, the bulk of mankind . . . will continue to view them in a different light. It remains then to be enquired whether a majority having any common interest, or feeling any common passion, will find sufficient motives to restrain them from oppressing the minority.

Letter from James Madison to Thomas Jefferson (Oct. 14, 1787), *reprinted in* 5 The Writings of James Madison 29.

Madison's distrust of government according to the will of a majority of the electorate was based on first hand observation:

In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current. Notwithstanding the explicit provision contained in that instrument for the rights of Conscience, it is well known that a religious establishment [would] have taken place in that State, if the Legislative majority had found as they expected, a majority of the people in favor of the measure Wherever the real power in Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in id.* at 272.

In the Federalist papers Madison argued forcefully that a republican form of government was essential to preserve minority rights.

Complaints are every where heard . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, *not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.* . . .

. . . [Factions develop whereby] a number of citizens, whether amounting to a majority or minority of the whole, . . . are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

.

. . . [T]he most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests of society. . . . A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation

.

. . . When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. . . .

.

. . . [In a pure democracy a] common passion or interest will, in almost every case, be felt by a majority of the whole; . . . there is nothing to check the induce-

ments to sacrifice the weaker party or an obnoxious individual. . . .

A republic . . . promises the cure for which we are seeking. . . .

The Federalist No. 10, at 104-09 (J. Madison) (Hamilton ed. 1868) (emphasis added).

Alexander Hamilton expressed similar apprehensions for the rights of property owners in his contributions to the Federalist. He wrote: "[A]dditional security to republican government, to liberty, and to property," is to be derived from the adoption of the Constitution. *Id.* No. 85, at 639 (A. Hamilton); and, "[A strong executive is essential] to the protection of property against those irregular and high-handed combinations, which sometimes interrupt the ordinary course of justice" *Id.* No. 70, at 522 (A. Hamilton).

Initially, Madison did not publicly support a bill of rights. Prior to the ratification of the Constitution he "opposed all previous alterations as calculated to throw the states into dangerous contentions, and to furnish secret enemies of the Union with an opportunity of promoting its dissolution." Letter from James Madison to George Eve (Jan. 2, 1789), reprinted in 5 Writings of James Madison 319-21 n. 1. Once the Constitution had been ratified by eleven states and "a very great majority of the people of America," he felt that "[c]ircumstances are now changed." *Id.* Madison reversed his position and supported the amendments as "providing additional guards in favor of liberty." *Id.* On June 8, 1789, Madison presented a draft of twelve proposed amendments to the first session of Congress. Stoeckel, *A General Theory of Eminent Domain*, 47 Wash.L.Rev. 553, 595 (1972). Included was the following eminent domain clause: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensa-

tion." 1 Annals of Congress 434 (J. Gales ed. 1789). Stoe-
 buck, *A General Theory of Eminent Domain*, 47 Wash.L.
 Rev. 553, 595 (1972).

If we look to the language of the Federal Constitution, and interpret the protection afforded property interests contained therein according to the intent of those who drafted it, it becomes unmistakably clear that the Hawaii Land Reform Act is unconstitutional. As anticipated by Madison, the Hawaii Legislature has become the instrument by which private property held by a minority of the persons within that state is to be redistributed to appease the desires of a landless majority to own residential land. The Federal Constitution and the fifth and fourteenth amendments were adopted with the express purpose of invalidating the taking of the private property from one person for the private and exclusive enjoyment by another.

IV

We are told by Appellees that court interpretations of the Federal Constitution support the validity of the Hawaii Land Reform Act. Our analysis of the cited cases follows. Although the scope of the power of eminent domain has been only vaguely and inconsistently stated, see Berger, *The Public Use Requirement in Eminent Domain*, 57 Or.L.Rev. 203, 204-05 (1978), there is one instance where there is general agreement that eminent domain must not be used. The sovereign may not take the private property of *A* and transfer it to *B* solely for *B*'s private use and benefit. *Missouri Pacific Railway Co.*, 164 U.S. at 417, 17 S.Ct. at 135; B. Schwartz, *A Commentary on the Constitution of the United States, The Rights of Property* (pt. 2) 241 (1965); see also, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388, 1 L.Ed. 648 (1798) (Chase, J., seriatum opinion) ("[A] law that takes property from *A*. and gives it to *B*. . . is against all reason and justice . . ."). None of the authorities cited by appellees has declared such an attempt constitutional.

V

The cases upholding takings for a public use teach us that we must look at each case on an ad hoc basis: "[W]hat is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned." *Fallbrook Irrigation District*, 164 U.S. at 159-60, 17 S.Ct. at 63. There are several recurring facts and circumstances, however, that are present in the cases in which appellate courts have found a proper exercise of the power of eminent domain.

Courts have found that a taking has been for a public use where:

A. The taking will result in condemnation of property for an historically accepted public use.

B. The taking will result in a change in the use of the land.

C. The taking will result in a change in possession of the land.

D. The taking will result in a transfer of ownership from a private party to a governmental entity.

E. The taking will result in a de minimis condemnation necessary to facilitate the development of nearby land. None of these facts nor circumstances are present in the Hawaii Land Reform Act.

A

Following the establishment of the United States Constitution, there were two major kinds of activities for which the power of eminent domain was undisputedly properly employed: mill acts and road building. See *Berger, supra* at 205. General mill acts allowed any owner of land upon a nonnavigable stream to build and maintain mills for manu-

facturing purposes. See *Head v. Amoskeag Manufacturing Co.*, 113 U.S. 9, 20-21, 5 S.Ct. 441, 445-446, 28 L.Ed. 889 (1885). In *Otis Co. v. Ludlow Manufacturing Co.*, 201 U.S. 140, 26 S.Ct. 353, 50 L.Ed. 696 (1906), the plaintiff challenged a general mill act enacted by Massachusetts. The Supreme Court summarily disposed of any general objection to the act on the basis that it constituted a taking for private use violative of the fourteenth amendment and noted that: "Such acts have been in force in Massachusetts ever since an act of 1714. . . . The practice sanctioned by them would seem from the recitals of that act to have been still older." *Id.* at 151, 26 S.Ct. at 354.

The Supreme Court similarly recognized a long-standing tradition of the use of eminent domain for the purpose of building roads in *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 706, 43 S.Ct. 689, 692, 61 L.Ed. 1186 (1923). In *Rindge*, plaintiffs objected to the taking of its property for two proposed highways that were to be built entirely on its private property. Only one of the roads, the "main road," was to be connected to a public highway and only at one end; the other road, was to branch off the main road. *Id.* at 703, 43 S.Ct. at 691. The Court upheld the condemnation as being for a public use: "That a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial." *Id.* at 706, 43 S.Ct. at 692.

This court found condemnation of private land for road building was a public use in *Guam v. Moylan*, 407 F.2d 567, 567-68 (9th Cir.1969). The rationale, however, was based upon an analogy to redevelopment cases. See *id.* at 568.

Where the purpose of a taking has been historically deemed to be for the public it will be upheld by the courts.

B

The taking of private property has been upheld where there is a change in the use of the land. Often the change in the use is obvious and direct. Examples include the con-

demnation of land to build roads where no previous roads exist as in *Rindge*, 262 U.S. at 702-03, 43 S.Ct. at 691 or to build a railroad spur where no previous track exists. *Hairs-ton v. Danville & Western Railway*, 208 U.S. 598, 600-01, 28 S.Ct. 331, 332-333, 52 L.Ed. 637 (1908). Similarly upheld are condemnations for the purpose of developing a power plant, *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32, 36 S.Ct. 234, 236, 60 L.Ed. 507 (1916) or developing a recreational area, *United States ex rel. TVA v. Welch*, 327 U.S. 546, 550, 66 S.Ct. 715, 717, 90 L.Ed. 843 (1946) (condemnation by TVA of private property for transfer to the National Park Service as part of the Great Smokey Mountains National Park); *United States v. 416.81 Acres of Land*, 514 F.2d 627, 629 (7th Cir., 1975) (undeveloped lands condemned for the Indiana Dunes National Lakeshore). Changes in the use of condemned property also may be upheld where the change is of a less direct nature. One such example involves the redevelopment of a community. *E.g.*, *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (discussed *infra*, § VI(A)).

Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946) is an example of a case that involves both changes of a direct and indirect nature. The major agricultural holdings of a landowner were to be condemned for, inter alia, three purposes which would result in a change in the use of the property: "(1) in small parcels to individual agregados [squatters] for the erection of their dwellings, (2) in somewhat larger parcels to individual farmers for subsistence farms and (3) in large parcels by lease to expert farmers, agronomists, or other qualified persons . . . for the operation of 'proportional-profit' farms" *Id.* at 319. Thus agricultural land was to be taken in some instances for building residences and in other instances for smaller farms, either upon which an individual could subsist or upon which experts would operate proportional profit farms.

In each of the foregoing cases land was condemned for the purpose of putting it to a different use.

C

Another factual circumstance common to many constitutional takings is that the party who will possess the land after condemnation is not the same party who possesses it prior to the condemnation. The majority of the cases discussed above include examples of such a transfer of possession. One example of an instance where the possessor was the same before and after condemnation can be found in two cases where the government condemned a reversionary interest it held in leased land. *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70 L.Ed. 162 (1925) (federal government can properly condemn reversionary interest in land it was leasing for possible military purpose); *United States v. Certain Parcels of Land*, 141 F.Supp. 300, 307 (D.Wyo.1956) (condemnation of reversionary interest in land leased by government upon which government housing had been built is for a public use), *aff'd sub nom. Arp v. United States*, 244 F.2d 571 (10th Cir.), *cert. denied*, 335 U.S. 826, 78 S.Ct. 34, 2 L.Ed.2d 40 (1957). It is important to note, however, that in both of these cases, the government, not a private party, was the beneficiary of the condemnation.

D

Where the beneficiary of the condemnation is a governmental entity there is a strong indication that the taking is for a public use:

[W]here the land is taken by the government itself, there is not much ground to fear any abuse of the [eminent domain] power. . . . [When the power is delegated to a private corporation] the presumption that the intended use for which the corporation proposes to take the land is public [when declared to be

so by the legislature], is not so strong as where the government intends to use the land itself.

United States v. Gettysburg Electric Railway, 160 U.S. 668, 680, 16 S.Ct. 427, 429, 40 L.Ed. 576 (1896). In two cases where the government was the beneficiary of condemned property, the government was a lessor seeking condemnation of the fee simple interest. In *Old Dominion Land Company* the government leased land for military purposes. 269 U.S. at 63, 46 S.Ct. at 39. When the lessor refused to renew the leases, the government initiated condemnation proceedings after an offer to purchase the land was refused. *Id.* The Court upheld the taking as a public use. *Id.* at 66, 46 S.Ct. at 40. Similarly, in *Certain Parcels of Land*, the government leased land upon which it built and maintained a housing project. 141 F.Supp. at 303. The owners of the land refused to renew the lease and the government sought to condemn the fee simple title. *Id.* The court found acquisition of the fee did not violate the public use limitation in violation of the owners' constitutional rights. *Id.* at 307.

Eastern Sugar Association, 156 F.2d at 319, also involved a situation where the government could have remained in possession of the condemned land after condemnation. One of the acts that was challenged permitted the government to purchase lands and establish an organization to plant sugar cane for development of the sugar and liquor industries. *Id.* This was upheld as a taking for a public use. *See id.* at 324.

E

Finally, courts have upheld the condemnation of land where the taking is de minimis and for the purpose of facilitating the development of nearby land.

In *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906), a mining company

sought to condemn land for a right of way. The purpose was to erect an aerial bucket line that would result in the placement of four movable towers on the condemnees' land. *Id.* at 529-30, 26 S.Ct. at 302. The line would transport ore from the mines to the railway station two miles away. *Id.* at 529, 26 S.Ct. at 3021. *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905), involved an attempt to condemn a portion of a neighbor's land by enlarging a ditch to irrigate the condemnor's arid land to produce crops. *Id.* at 362, 25 S.Ct. at 676. The public use was upheld in both of these cases. In each case, the extent of the taking was minimal. The towers in *Strickley* were not permanent and the condemnor was under an obligation "to move the towers as often as reasonably required by the owners" in order for them to mine their land. 200 U.S. at 530, 26 S.Ct. at 302. *Clark* involved taking only enough land to widen by twelve inches the existing irrigation ditch which measured eighteen inches wide, twelve inches deep. 198 U.S. at 363, 25 S.Ct. at 676-677. Thus, both condemnations involved a minimal taking of land that resulted in an increased productivity of nearby land.

VI

A

The thrust of the Appellees contentions concerning the public use issue is that this court's inquiry must be restricted to whether the legislature, in enacting the Hawaii Land Reform Act, was acting within the parameters of its police powers. For example, Appellee Kahala Community Association, Inc. and Kahala Community Association Fee Purchase Fund assert the following:

Berman [348 U.S. at 26, 75 S.Ct. at 98] could not be clearer. If the legislative object is within its authority, the use of eminent domain is permissible, since that power serves simply as a means to the end. It follows that if it is constitutional to pursue an objective by police power regulations, eminent domain may be used.

**Brief for Appellees Kahala Community Association, Inc.
& Kahala Community Association Fee Purchase Fund at
23.**

We disagree. *Berman* does not paint with so broad a brush. *Berman* involved the condemnation of buildings in a slum area for the purpose of building a new community. Congress had made a determination that the slum area was harmful to the health, safety, morals, and welfare of the public. *Id.* at 28, 75 S.Ct. at 100. It declared that condemnations for redevelopment pursuant to the redevelopment plan were for a public use. *Id.* at 29, 75 S.Ct. at 100-101. Buildings that were old, decayed, and unsafe were to be razed and replaced by new buildings. New homes, schools, churches, parks, streets and shopping centers were to be built. *See id.* at 34-35, 75 S.Ct. at 103-104. The court focused on the planned condemnations on an area basis rather than on a structure-by-structure basis. *Id.* at 34, 75 S.Ct. at 103. Thus, it was not important whether a single building represented a safety or health hazard or was unsightly. The important fact was "to redesign the whole area so as to eliminate the conditions that cause slums—the over-crowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns." *Id.* This transformation from slum to healthy thriving community represents a change in the use of the land.

By contrast, the Hawaii Land Reform Act will result in no change in use of the property. The property itself is currently used for residential purposes. After condemnation it will be used for residential purposes. Appellees argue that there is a change in use in that the land is now used for investment purposes; subsequent to condemnation it will only be used for residential purposes and the owner of the newly created fee simple land will treat the property differently because he knows he can stay there as long

as he chooses. These alleged changes in use, however, are simply different forms of *private* use.

The redevelopment in *Berman* authorized the transfer to public agencies of land "to be devoted to such public purposes as streets, utilities, recreational facilities, and schools." *Id.* at 30, 75 S.Ct. at 101. The remaining land was to be redeveloped preferably by private enterprise. *Id.* Thus, it was possible that certain property owners would be permitted to repurchase their properties. *Id.* at 34, 75 S.Ct. at 103. The key in *Berman* is the intermediate step in which the property was transferred from the private owner to the government for a public purpose, i.e., the redevelopment of the area. In the case before us there is no such intermediate step in which the government holds the property for the accomplishment of a public purpose. The lessee simply retains possession of residential property throughout the condemnation process until he receives fee simple title. *Berman* does not authorize such a scheme. Nothing in *Berman* permits the lessee of property to take ownership of that property from the owner involuntarily through condemnation proceedings. Nothing in *Berman* would provide, as does the Hawaii Land Reform Act, the lessee of condemned property with greater rights to that property than the owner.

It is against this factual background that we must read its sweeping language: "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.* at 33, 75 S.Ct. at 103. The Supreme Court also stated in *Berman* that: "*Subject to specific constitutional limitations*, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Id.* at 32, 75 S.Ct. at 102 (emphasis added). We read this language as requiring the judiciary to scrutinize carefully any legislative attempt to take private property so as to determine if it is in violation of any

constitution provision. The fifth amendment is specific: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V; *see also*, cases cited § VI(B) *infra* (role of judiciary in determining public use). To hold, as the district court below did, that the public use limitation is subsumed under a "police power/due process analysis," *Midkiff*, 483 F.Supp. at 67, would be to ignore the explicit language of the constitution and to disregard the fifth amendment protections granted to citizens of the states under the fourteenth amendment. *See, e.g., Missouri Pacific Railway*, 164 U.S. at 417, 17 S.Ct. at 135. Such a result is untenable. Indeed, the Supreme Court has held that merely because the legislature has the power to regulate private property does not allow it to take that property without just compensation in violation of the fifth amendment. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S.Ct. 383, 392-393, 62 L.Ed.2d 332 (1979). It follows that because the state legislature has the power to regulate private property does not allow it to take that property for a nonpublic use in violation of the fourteenth amendment.

B

Appellees citing *Old Dominion Land Co.*, 269 U.S. at 66, 46 S.Ct. at 40, also argue that review by this court is limited to the question of whether the determination of the existence of public use by the Hawaiian Legislature, Hawaii Rev.Stat. § 516-83(a)(12)* "is shown to involve an impossi-

*Hawaii Rev.Stat. § 516-83(a)(12) states:

The use of the power to eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is *for a public use* and purpose.

(emphasis added).

bility." Appellees direct our attention to the following cases as well: *Berman*, 348 U.S. at 32, 75 S.Ct. at 102 (citing *T.V.A.*, 327 U.S. at 552, 66 S.Ct. at 718; *Old Dominion Land Co.*, 269 U.S. at 66, 46 S.Ct. at 40); *Gettysburg Electric Railway Co.*, 160 U.S. at 680, 16 S.Ct. at 429; *Southern Pacific Land Co. v. United States*, 367 F.2d 161, 162 (9th Cir.1966), *cert. denied*, 386 U.S. 1030, 87 S.Ct. 1485, 18 L.Ed.2d 591 (1967). The cases cited by Appellees, however, involved the review of a *congressional* determination that there was a public use, *not* the review of a state legislative determination. In *T.V.A.*, 327 U.S. at 552, 66 S.Ct. at 718 the Supreme Court stated that review of a congressional public use declaration is not the same as the review of a state legislative determination: "But whatever may be the scope of the judicial power to determine what is a 'public use' in Fourteenth Amendment controversies, . . . when *Congress* has spoken on this subject 'Its decision is entitled to deference until it is shown to involve an impossibility.'" (quoting *Old Dominion Land Co.*, 269 U.S. at 66, 46 S.Ct. at 40 (emphasis added)). Where a state legislative determination is involved: "[i]t is well established that . . . the question what is a public use is a judicial one." *Cincinnati v. Vester*, 281 U.S. 439, 446, 50 S.Ct. 360, 362, 74 L.Ed. 950 (1930); this matter involves a review, under the fourteenth amendment, of a state legislative determination. This court must properly make the ultimate determination of whether the use is public.

Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 25 S.Ct. 251, 49 L.Ed. 462 (1905) cited by one of the appellees for the proposition that courts should pay deference to state legislative determinations, is particularly appropriate here. The Court is explicit: "It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain . . . For if the use be not public . . . the legislature cannot authorize the taking of private property against the will of the owner,

notwithstanding compensation may be required.' " *Id.* at 252, 25 S.Ct. at 256 (quoting *Tracy v. Elizabethtown, Lexington & Big Sandy Railroad*, 80 Ky. 259, 265 (1882)). Moreover, were Congress to enact a statutory provision that would allow condemnation of *A*'s private property for transfer to *B*, solely for *B*'s private use, this court would necessarily find such action contrary to the fifth amendment whether or not congress declared such proceedings to be for a public purpose. See, e.g., *Colchico v. United States*, 286 F.Supp. 507, 509 (N.D.Cal.1968) (court to review whether federal taking for a public use); *United States v. 23.9129 Acres of Land*, 192 F.Supp. 101, 102 (N.D.Cal.1961) ("This court need not, and will not, stand idly by and allow [federal] administrative officials to take private property arbitrarily, capriciously, in bad faith, or for what is essentially a private purpose." (emphasis added)).

VII

When we strip away the statutory rationalizations contained in the Hawaii Land Reform Act, we see a naked attempt on the part of the state of Hawaii to take the private property of *A* and transfer it to *B* solely for *B*'s private use and benefit.

The founders of this nation sought to give constitutional protection to minority rights. They wisely foresaw that attempts would be made by the states to take away the private property rights of the landed minority. Our Federal Constitution and the Bill of Rights were designed to prevent such abuses by the majority. That Constitution now compels us to find that the Hawaii Land Reform Act violates the public use limitation of the fifth and fourteenth amendments. Those provisions of the Hawaii Land Reform Act that provide for the condemnation of certain residential property are facially unconstitutional.

The decision of the district court is **REVERSED** and **REMANDED** for further proceedings consistent with the views expressed in this opinion.

POOLE, Circuit Judge, concurring.

I concur in Judge Alarcon's careful and well-researched opinion and in his conclusion that the Hawaii Land Reform Act violates the Fifth and the Fourteenth Amendments to the Constitution of the United States. I recognize that another member of this court, whose opinion is of value and entitled to thoughtful consideration, expresses a contrary view.

Nonetheless an independent review convinces me that in light of all considerations of logic, of the compelling authority of precedent, and of the Constitution itself, the Hawaii Land Reform Act is unconstitutional. It is my further opinion that the United States District Court properly undertook to decide that issue but reached a manifestly erroneous conclusion in upholding the Act.

But however firm these conclusions may appear to me, I am concerned that we not seem to have, as charged in our brother's scold, "cavalierly" ventured to decide these legal issues; asked the "wrong" questions and gotten "wrong" answers; or foresworn that "judicial modesty" which ought to have warned that we are not in position (as presumably are the Hawaiian legislature and courts) "to judge the effectiveness and constitutionality of any attempt at reform." I therefore think it useful to set forth in calmness and reason such of my own analysis as may indicate why the dissent is mistaken. For it is incorrect that we should have abstained; and it is incorrect that there was not squarely presented to a court of the United States an unavoidable constitutional issue which this court was bound to meet and which, I submit, we now have properly decided.

I. Abstention.

First of all, we have decided this constitutional issue because it is before us and as a court of the United States we are obligated to hear and decide those issues over which we have jurisdiction. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). It is that obligation, not pride or immodesty, that makes federal abstention "the exception, not the rule." *Id.* See also *Knudsen Corp. v. Nevada State Dairy Commission*, 676 F.2d 374, 376-78 (9th Cir.1982); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 819-21 (9th Cir.), *cert. denied*, U.S., 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982). Abstention is only appropriate "in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest" *Colorado River*, 424 U.S. at 813, 96 S.Ct. at 1244 (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1062-1063, 3 L.Ed.2d 1163 (1959)). Since the decision to abstain involves the district court's discretionary exercise of its equitable powers, it is reviewed under the abuse of discretion standard. *Turf Paradise*, 670 F.2d at 819. It would have been an abuse of discretion had the district court abstained.

A. *Pullman* Abstention

Four general categories of abstention have been generally recognized. The first, *Pullman* abstention, is appropriate where a federal constitutional issue may be avoided or presented in a different light by resolution of an issue under state law. *Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244-1245; *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Knudsen Corp.*, 676 F.2d at 377. For example, a state court might interpret the provisions of a challenged statute so as to moot the federal constitutional issue raised. See, e.g., *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir.1981), *cert. denied*, 455 U.S. 913, 102 S.Ct. 1264, 71 L.Ed.2d 453 (1982). Here, how-

ver, as Judge Alarcon points out, the Hawaii Land Reform Act specifically provides that its provisions are intended to serve "a public use and purpose." Hawaii Rev.Stat. § 516-83(a)(12). Therefore, state courts of Hawaii could not interpret the statute to avoid the "public use" issue and hence federal review is not thereby spared.

Pullman abstention may also be appropriate where a state court may find that the challenged statute violates the state's own constitution. But such abstention is limited to application of a specialized state constitutional provision with no clear counterpart in the federal constitution. See *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 840-41 n. 3 (9th Cir.1979); *Pue v. Sillas*, 632 F.2d 74, 80-81 (9th Cir.1980); C Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4242 at 462-63 (1978). The Hawaii Constitutional Provision concerning eminent domain imposes the same "public use" standard as required under the Fifth and Fourteenth Amendment due process clauses of the United State Constitution. See Hawaii Const. art. I, § 20¹; *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896). Therefore *Pullman* abstention to permit application of this "mirror image" state constitutional provision would not be appropriate.² See, e.g., *Examining Board of Engineers, Architects, and Surveyors v. Flores de Otero*, 426 U.S. 572, 598, 96 S.Ct. 2264, 2279, 49 L.Ed.2d 65 (1976) (abstention not appropriate under state constitutional provisions similar to federal constitution equal protection clause); *Pue v. Sillas*, 632 F.2d at 81.

¹Section 20 provides:

Private property shall not be taken or damaged for public use without just compensation.

²The dissent implies, but does not endeavor to support, the view that somehow the courts of Hawaii might chance upon a construction of the Land Reform Act under circumstances not relying upon familiar concepts of "public use." Since this is only sheer speculation, it need not detain our thoughts.

B. *Burford* Abstention

Abstention may also be appropriate under the standards originally set out in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), to avoid "federal intrusion into matters which are largely of local concern and which are within the special competence of local courts." *International Brotherhood of Electrical Workers, Local Union No. 1245 v. Public Service Commission*, 614 F.2d 206, 212 n. 1 (9th Cir.1980). In considering *Burford* abstention this court has examined whether the state channels into a single court lawsuits challenging the state agency's actions, whether the federal issues are inextricably linked to the state law issues, and whether federal adjudication would interfere with the state's efforts to maintain a consistent policy. See *Knudsen Corp.*, 676 F.2d at 377; *International Brotherhood of Electrical Workers*, 614 F.2d at 211.

Hawaii has not created specialized courts to hear cases arising under the Act and the federal due process issue is not linked to complex state law issues. Moreover, we have recently specifically refused to apply *Burford* abstention to cases involving zoning and land use questions, even though, as appellees suggest, issues regarding land use and regulation are special local concerns. See *International Brotherhood*, 614 F.2d at 211; *Isthmus Landowners Association v. California*, 601 F.2d 1087 (9th Cir.1979) (challenge to coastal zoning regulations); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092 (9th Cir.1976) (zoning challenge); *Santa Fe Land Improvement Company v. City of Chula Vista*, 596 F.2d 838 (9th Cir.1979). Thus, *Burford* abstention is not appropriate in this case.¹

¹The principal case upon which appellees rely, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959), is generally classified as within *Burford* abstention. See *Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244-1245. In *Thibodaux* the Court upheld a lower court decision to abstain in an eminent domain action removed to federal court, referring

C. Prudential Abstention—*Colorado River*

The third ground for abstention recognized in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), stems from principles of “wise judicial administration.” 424 U.S. at 817, 96 S.Ct. at 1246 (quoting *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952)). A district court may abstain where “exceptional circumstances . . . indicate that concurrent jurisdiction by state and federal courts is likely to cause piecemeal litigation, waste of judicial resources, inconvenience to the parties, and conflicting results.” *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir.1979). However, given the “unflagging obligation” of the federal courts to exercise their jurisdiction, the applicability of this doctrine is even more limited than the circumstances normally

to the “special nature” of eminent domain as “intimately involved with sovereign prerogative.” 360 U.S. at 28, 79 S.Ct. at 1073.

Yet *Thibodaux* should not be read as an endorsement of abstention in all proceedings involving eminent domain. On the day it decided *Thibodaux*, the Court held that abstention was not appropriate in another eminent domain case, *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959). The Court specifically stated that merely because “a case concerns a state’s power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty.” 360 U.S. at 191-92, 79 S.Ct. at 1064.

Although the two opinions are not easily reconciled, see C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 4241 at 441 (1978), the Supreme Court has subsequently indicated that the principal significance of *Thibodaux* is its holding that a district court may find it necessary to abstain where the case involves “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.” *Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244. In particular, the state law issue in *Thibodaux* was whether a city could exercise the power of eminent domain under Louisiana law—an issue, as *Colorado River* suggests, which transcended the importance of the case itself. Here there is no such independent state law issue.

justifying abstention. *Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246-1247. Thus in *Colorado River* the Court found that "exceptional circumstances" existed to dismiss the federal action in favor of a pending state action because of the Congressional policy set out in the McCarran Amendment to avoid piecemeal adjudication of water rights—a policy reflected in traditional rules governing the adjudication of property matters, and also because state law had established a single continuous proceeding for the adjudication of Colorado river water disputes. No comparable factors here favor adjudication in state court, and therefore the heavy burden necessary to justify abstention has not been met.

D. *Younger* Abstention

A fourth area for abstention is based on the principles of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Younger* held abstention appropriate where the federal claimant sought to restrain on-going state criminal judicial proceedings. The principle has subsequently been extended beyond the criminal context to state proceedings which involve "important state interests." *Middlesex County Ethics Committee v. Garden State Bar Association*, U.S., 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). Thus, the Supreme Court has specifically approved abstention to avoid interference with civil contempt proceedings initiated by a state court, *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); attachment proceedings brought by a state to recover welfare payments procured by fraud, *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977); a custody proceeding in which the state sought to recover custody of abused children, *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979); and state disciplinary proceedings for members of the bar, *Middlesex*, 102 S.Ct. at 2523 ("The importance of the state interest in the pending state juris-

diction proceeding * * * calls *Younger* abstention into play"); and *id.* at 2524 ("No proceedings have occurred on the merits and therefore no federal proceedings on the merits will be terminated by application of *Younger* principles"). Since the federal claimant could raise the constitutional claims in the state proceedings, the interests of comity and federalism precluded federal interference in the state proceedings. See Hart & Wechsler, *The Federal Courts and the Federal System* 280-82 (Supp. 1981).

Although the Supreme Court has not addressed the issue, in *Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir.1975), the Seventh Circuit has held that a state's interest in eminent domain proceedings constitutes so important a governmental interest that *Younger* abstention is appropriate. That court reasoned that since the federal constitutional claims could be raised in the ongoing state court proceedings it was appropriate for the federal court to abstain "so as not to interfere with state sovereignty." 528 F.2d at 200.

Ahrensfeld, however, relied only in part on *Younger's* abstention doctrine. The court also found that "other circumstances" were present which made *Pullman* abstention appropriate because of an unresolved issue regarding state valuation standards.⁴ 528 F.2d at 199-200. But as indicated

⁴The project involved was the taking for the construction of an Athletic and Convention Center. The federal plaintiffs challenged public purpose and also that such a taking was improper under the applicable Illinois Eminent Domain Act. The court said: "Since 'the state court's interpretation of the [statute] may obviate any need to consider [its] validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily.'" 528 F.2d at 200 (citing *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 641, 79 S.Ct. 455, 457, 3 L.Ed.2d 562 (1959), and *Martin v. Creasy*, 360 U.S. 219, 224, 79 S.Ct. 1034, 1037, 3 L.Ed.2d 1186 (1959). (Citations omitted.)

above, *Pullman* abstention is not appropriate here. Also, as already said, this circuit has concluded that a state's interest in land use and regulation does not automatically justify abstention under the *Burford* doctrine, which, like *Younger*, contemplates deference where there is an ongoing state judicial proceeding. See *Middlesex County Ethics Committee, supra*; *Zablocki v. Redhail*, 434 U.S. 374, 380 n. 5, 98 S.Ct. 673, 678 n. 5, 54 L.Ed.2d 618 (1978). Such ongoing action must begin "before any proceedings of substance on the merits have taken place in the federal court." *Hicks v. Miranda*, 422 U.S. 332, 349, 95 S.Ct. 2281, 2292, 45 L.Ed.2d 223 (1975); *Middlesex*, 102 S.Ct. at 2524. Unless such an action is underway the interests expressed in *Younger* of avoiding duplicative litigation and interference with the state judicial system are not applicable. And proceeding in the federal action in such circumstances is not to be regarded as reflecting a lack of confidence in the state court's adjudication of constitutional issues because "the relevant principles of equity, comity, and federalism have little force in the absence of a pending state proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974).

Appellants in this case filed their district court complaint in February, 1979. At that time the only extant proceedings at the state level were public hearings being conducted by the Hawaii Housing Authority as required under the Hawaii Land Reform Act before instituting condemnation of certain of appellant's residential tracts. See Hawaii Rev.Stat. § 516-22.⁵

⁵Section 516-22 provides:

Designation of leased fee interest in all or part of development tract for acquisition. The authority may designate all or a portion of a development tract for acquisition and acquire leased fee interests in residential houselots in such development tract, through the exercise of the power of eminent domain or by purchase under the threat of eminent domain after

The dissent refers to four state court condemnation suits which at various times were pending in the state court. All were settled without trial. Three were terminated before the district court ruled on the summary judgment motions before it. The fourth remained pending after the final judgment was entered here, but it too was settled. The dissent misreads the law in its premise that the mere filing of a

twenty-five or more lessees or the lessees of more than fifty percent of the residential lease lots within the development tract, whichever number is the lesser, have applied to the authority to purchase the leased fee interest in their residential leasehold lots pursuant to section 516-33 and if, after due notice and public hearing, * * * the authority finds that the acquisition of the leased fee interest in residential house-lots in all or part of the tract through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof, as provided in this part will effectuate the public purposes of this chapter.

Younger abstention was, as contended by the dissent, not triggered by the Housing Authority hearings provided by the statute since the Supreme Court has indicated that abstention is limited to judicial and not administrative proceedings. See *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 112-13, 102 S.Ct. 177, 184, 70 L.Ed.2d 271 (1981). Cf. *Patsy v. Board of Regents*, . . . U.S. . . . , 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) (exhaustion of state administrative remedies not required under section 1983).

In *Middlesex*, 102 S.Ct. at 2522, the Court concluded that the district court properly abstained to prevent interference with disciplinary proceedings of a local District Ethics Committee appointed by the New Jersey Supreme Court. However, there the Court specifically found that under New Jersey law the proceedings were "judicial in nature." In particular, the Court noted that the local committees are considered the arm of the New Jersey Supreme Court and that filing a complaint with the committee "is in effect a filing with the Supreme Court."

In the present case, the public hearings before the Hawaii Housing Authority bear none of the attributes of a judicial proceeding such as that found in *Middlesex*.

condemnation action would *proprio vigore* bring into play the requirement of abstention. As Justice Brennan stated in *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10, 94 S.Ct. 1209, 1216 n. 10, 39 L.Ed.2d 505 (1974):

"The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. [Citations omitted.]

In May, 1979, the district court heard appellants' motion for a preliminary injunction. It found that on the merits appellants were unlikely to prevail on their general due process challenge, but that the statute's mandatory arbitration and valuation provisions were facially unconstitutional. Accordingly, the court held that the state administrative condemnation proceedings could proceed but it enjoined the operation of the objectionable arbitration and valuation provisions.⁶ The Hawaii Housing Authority did not actually file the first of its eminent domain lawsuits in state court against appellants until September, 1979, shortly after the parties in district court had begun filing motions for summary judgment.

Thus by the time the state proceedings were instituted in this case the federal action was well beyond "the embryonic stage." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929, 95 S.Ct. 2561, 2566, 45 L.Ed.2d 648 (1975). Under those circumstances abstention was not appropriate. *See id.* (Younger abstention not applicable where district court issued preliminary injunction prior to institution of state criminal action); *Housworth v. Glisson*, 485 F.Supp. 29 (N.D.Ga. 1978) (hearing for injunctive relief on plaintiff's likelihood of success qualifies as proceedings of substance on the merits).

⁶Following the district court's ruling, the Hawaii Legislature amended Section 516 to remove the mandatory arbitration provision and to amend the valuation provisions.

Moreover, it appears that the state attorney general never raised the *Younger* issue at any time before the district court.⁷ Although the parties may not waive the applicability of *Pullman* abstention, see e.g., *Santa Fe Land Improvement Co.*, 596 F.2d at 840, the Supreme Court has specifically indicated that the *Younger* doctrine need not be considered if not invoked by the state:

If the state voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system.

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 480, 97 S.Ct. 1898, 1904, 52 L.Ed.2d 513 (1977). Accordingly, in submitting the issue of the statute's constitutionality to the district court in this case, it appears that the Hawaii attorney general effectively waived his claim for *Younger* abstention. See *Universal Amusement Co. v. Vance*, 587 F.2d 159, 163 n. 5 (5th Cir.1978), *aff'd*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); *Evansville Book Mart, Inc. v. City of Indianapolis*, 477 F.Supp. 128, 130 (S.D.Ind.1979); Wright, Miller & Cooper, *Federal Practice and Procedure* § 4252, at 547-48 (1978). We need not, however, rely solely on waiver, for independently it is clear that *Younger* does not apply.

In sum, none of the circumstances recognized by the federal courts as calling for abstention are present here. Therefore the district court did not abuse its discretion in proceeding to decide the constitutional issue before it.

II. Public Use

The Hawaii Land Reform Act, Part II, authorizes eminent domain proceedings for the purpose of transferring from the fee owners to existing lessees the fee simple title

⁷In fact, no party addressed the abstention issue until the court raised the subject at oral argument.

to single family residential lots held under long term ground leases. Haw.Rev.Stat. §§ 516-21 through 45. The act applies to residential lots of not more than 2 acres located in development tracts of not less than 5 acres and held under leases for terms of twenty years or more. Haw.Rev.Stat. § 516-1(2), (5), (11).

Condemnation proceedings are actually initiated on petition of lessees desiring to obtain the fee title to their leased property. The statute requires that the application be on behalf of the lessees of 25 lots or 50% of the lots in a development, whichever is less. Haw.Rev.Stat. § 516-22.

While the statute permits the state to appropriate funds and issue bonds for the purpose of implementing the statute, it appears that (except for administrative overhead) the state uses no public monies to acquire property under the statute. The condemnation award and incidental costs of condemnation are paid by the private lessee acquiring a given property. Haw.Rev.Stat. §§ 516-30, -33, -33.5.

Under the statute, the Hawaii Housing Authority may elect to condemn only those lots which lessees have applied to purchase. Haw.Rev.Stat. § 516-22. While the Housing Authority is required to find that the acquisition "will effectuate the public purposes" of the statute, it need not find existence of a shortage of fee simple property in the county in which a condemned lot is located. *Compare* 1967 Haw. Sess.Laws, Act 307 § 11 and Haw.Sess.Laws, Act 184 § 2(6) with 1976 Haw.Sess.Laws, Act 242 § 2 and Haw.Rev.Stat. § 516-22.

In addition to the condemnation provisions, the Hawaii statute also provides new safeguards to lessees of residential properties who continue under long term leases. Haw. Rev.Stat., Part III. Rights of Lessees, §§ 516-61 through 70. Among these are rent control and guarantees that such lessees may sell or assign their leasehold interests, and may cure default, this presumably easing the structures of the landlord-tenant rigid relationships.

But no restrictions are placed by the Act on the use or alienation by a lessee-turned feeholder of his property interest. If the new owner elects to let out to a new tenant under a long-term lease, that tenant does not receive protections of Part III. The new feeholder may therefore turn around and sell that property subject to a long-term ground lease in which *he* now holds a reversionary interest, thereby continuing the very cycle and effectively frustrating the avowed purpose of increasing the incidence of fee simple residential properties in Hawaii. Because the property is no longer part of a minimum five-acre tract, the lessee-turned-lessor's property is not subject to disfeasance by operation of the eminent domain scheme under which the former tenant, now a landlord of a long-term lease, acquired the interest. See Haw.Rev.Stat. § 516-1(5). Alternatively, of course, the new feeowner may elect to retain and live on his land as before, or may sell or lease a partial or entire interest therein, just as prior to the taking he and his former landlord had such options according to their respective holdings.

Thus the statute permits, but neither requires nor contemplates, a change in the use of the land. It merely provides a procedure for the involuntary transfer of title in the affected property from the disfavored lessor to the now advantaged lessee. Appellants argue that a condemnation scheme which results in change neither in use nor in possession, and whose sole effect is to transfer title from A (the lessor) to B (the lessee) does not constitute a taking for a public purpose, and so violates the fourteenth amendment. Judge Alarcon agrees, and I concur.

The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.

Missouri Pacific Railway v. Nebraska, 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896). "[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80, 57 S.Ct. 364, 376, 81 L.Ed. 510 (1937) (citing *Hairston v. Danville & Western Railway Co.*, 208 U.S. 598, 605, 28 S.Ct. 331, 334, 52 L.Ed. 637 (1908); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 705, 43 S.Ct. 689, 692, 67 L.Ed. 1186 (1923); *Cincinnati v. Vester*, 281 U.S. 439, 446, 449, 50 S.Ct. 360, 362, 363, 74 L.Ed. 950 (1930)). In my view, the Hawaii statute accomplishes precisely this invalid result, for if it does not constitute a transfer "for the private use of another," that term can have no meaning.

The legislature has set forth a number of findings in its attempt to clothe with the trappings of "public use" what is no more than a transfer for the private use of another. See e.g., Haw.Rev.Stat. § 516-83. Determining what constitutes a public use for fourteenth amendment due process examination of eminent domain proceedings, however, is a justiciable question ultimately to be determined by the court, and not the legislature. Thus, while a legislative determination of public use is entitled to considerable deference, it is not binding on this court. *Hairston v. Danville & Western Railway*, 208 U.S. 598, 606, 28 S.Ct. 331, 334, 52 L.Ed. 637 (1908); *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 551-52, 66 S.Ct. 715, 717-718, 90 L.Ed. 843 (1946); *Cincinnati v. Vester*, 281 U.S. 439, 446, 50 S.Ct. 360, 362, 74 L.Ed. 950 (1930); 2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain*, § 7.4 (1981).

It is true that "public use" is not synonymous with "use by the public," and that a state may condemn property to be sold or leased to individuals as Judge Alarcon has

explained, citing *inter alia*, *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906); *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369 (1896); *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied* 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946). But the private benefit must be an incidental one, and not the dominant purpose of the taking. *Adams v. Housing Authority*, 60 So.2d 663 (Fla.1952); *Baycol, Inc. v. Downtown Development Authority*, 315 So.2d 451 (Fla.1975).

[E]minent domain cannot be employed to take private property for a predominantly *private* use; it is, rather, the means provided by the constitution for an assertion of the public interest and is predicated upon the proposition that the private property sought is for a necessary public use. It is this public nature of the need and necessity involved that constitutes the justification for the taking of private property, and without which proper purpose the private property of our citizens cannot be confiscated, for the private ownership and possession of property was one of the great rights preserved in our constitution and for which our forefathers fought and died; it must be jealously preserved within the reasonable limits prescribed by law.

Id. at 455 (footnotes omitted).

In determining public use, the court may consider extrinsic facts and examine the statute as a whole to "discover the dominant purpose of the taking." 2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain* § 7.4[1]. "In short, the constitutional protection against the taking of public property for private use cannot be evaded by any colorable declarations that the use is public however formally and officially made." *Id.*

Upon examination of the statute and the evidence of record, I conclude that the Hawaii Land Reform Act's eminent domain provision cannot be saved as an exercise of police power. It is beyond doubt that legislation need not be wise, nor the best means for fulfilling relevant social and economic objectives. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 317, 96 S.Ct. 2562, 2568, 2569, 49 L.Ed.2d 520 (1976); *Dandridge v. Williams*, 397 U.S. 471, 487, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970). However, when as here the drastic effects of a statute contrast so starkly with its professed goals, leaving in shadow the nexus of reasonable relationship to those goals, one may question whether a public purpose in fact exists.

The Hawaii Land Reform Act proclaims its purpose to be the alleviation of the shortage of fee simple residential land in Hawaii. Yet, as set forth above (see page 13, lines 23-26), the legislature has amended the statute to delete a requirement that the Housing Authority, to whom is committed the power and decision to take, first find a shortage of fee simple housing in areas in which acquisitions under the statute are to be made.

The legislature has determined that the concentration of residential lands in the hands of a few holders who choose to lease under long term leases has caused shortage and has resulted in an inflation of land values. In fact, the statute itself is so structured that it can only aggravate this shortage and resultant inflation of land values. The Hawaii Circuit Court has found as fact that in late years the large landholders have made residential homesites available, albeit through the traditional leasehold arrangements. *Midkiff v. Amemiya*, Civ.No. 47103 (Haw. 1st Cir.) (Findings of Fact).

But those problems with the Act, while telling of its nature, could not alone condemn it entirely. What does infect it with unconstitutionality is that it authorizes an

agency of the state, upon the application of a tenant, to divest his landlord of the latter's entire property and to convey it to the erstwhile tenant in fee for the sole purpose of constituting that tenant as the owner. The statute does not accomplish this transformation merely incidentally en route to the effectuation of other, different, presumably more urgent objectives; nor is it that in its unreconstituted form, the present right of freeholding threatens, interferes with, delimits, pollutes or offends against the commonweal. The divestiture is single minded and patent of purpose: it strips the owner of the fee and vests the fee in the tenant. Otherwise, there is not an iota of change. Not a stick, stone, blade of grass, or flake of paint is altered; the use continues precisely as it was before; the awesome mechanism of taking becomes *functus officio* in the instant of its exercise; its only service is to sever ownership from A and bestow the same on B.

Indeed a unique and drastic analogue of "eminent domain" is created by this legislation; but that characterization would not alone be cause to strike it down. Indeed the purported justification is that it responds to a perceived need; but so also have many legislative enactments since December 15, 1791—the ratification date of the "Bill of Rights"—proclaimed their aim to attend outstanding needs, yet failed in passing constitutional muster. The problem which this Act cannot overcome is not its novelty or boldness or philosophical drift or internal deficiencies. The problem is in the bar of the Fifth Amendment which reads in simple words: "[N]or shall private property be taken for public use, without just compensation."

It is not enough that a "just" price be paid when the public (the state) seeks to invade the right of lawful private ownership: the use for which the taking is made must itself be for a public purpose. It is not a public purpose to take the property of one person in order that it may

become the private property of another. It is said that "outsiders" may have a problem "in comprehending the constitutionality" of this legislation. (Dissent, page 808.) A commentator, quoted *in extenso* by the dissent, *id.*, has written that one factor which a reviewing court might consider, "if only subconsciously, is the current political reality that in much of the world land reform is essential if democratic forms of government are to emerge or to prevail." That writer's thesis is that elsewhere "redistribution of the land" is taken for granted, and that it would be anomalous for "this government" to insist on land reform elsewhere if "its own Constitution prevents similar reforms in the American states."

However interesting a commentary on comparative international polity, that analogy and that rationale are both inapposite in the face of the organic restraints which our Constitution was intended and is held to impose upon governmental authority. We cannot foresee what the future may hold, and unborn generations may yet witness triumph of the right to such "redistribution" of the property of others. But before that Huxleyan advent, there will have to have come some change in Amendment V, with a corresponding disfavor of the principle, known to us not later than Magna Carta, that one's freehold may be taken only "by lawful judgment of his peers, or by the law of the land."⁸

⁸"No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed, nor will we go upon him, nor send against him, save by lawful judgment of his peers, or by the law of the land. We will not sell, nor deny, nor delay to any man either justice or right." Magna Carta (1225), Cap. XXIX, Pound and Plucknett, *Readings on the History and System of the Common Law*, 3d ed., page 180.

The legislature has found:

Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few land-owners of such land . . .

Haw.Rev.Stat. § 516-83(3).^o In fact, however, as the Circuit Court also found, on Oahu, the most populous Island with the most acute housing shortage, "there is only a 10 percent difference in the price between fee simple properties and comparable leasehold properties." *Midkiff v. Amemiya*, *supra* (Findings of Fact). The point is not that housing shortages do not exist in the Islands; it is that shortages of similar kind and degree exist in other of the 50 states, and so do constitutional limitations.

The thrust of the statute, therefore, is not nearly so much the providing of residential housing where it may not reasonably be had; it aims and objectives are to leave the residential supply as it exists, but to shift the fee from present owners to their lessees. And this in fact is all that the statute does.

In the Act before us the state legislature has simply decided that it prefers B's ownership of the land to A's, and the vesting of B with ownership of property heretofore lawfully held by A constitutes the statute's only substantive change. When, as here, the only variable presented is

^oWhile the legislature finds a shortage of fee simple residential property, it is significant there is a surplus of condominiums on the islands. See *Midkiff v. Amemiya* (Findings of Fact), *supra*.

whether A or B holds title to the land, the public purpose vanishes. *See Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. at 80, 57 S.Ct. at 376.¹⁰

I conclude therefore that the taking authorized by the Hawaii Land Reform Act is not a taking "by the law of the land" and is therefore invalid under the Fifth and Fourteenth Amendments to the Constitution of the United States.

FERGUSON, Circuit Judge, dissenting:

The majority cavalierly decides that the legislature of Hawaii is forbidden by the federal constitution to carry out its program of residential land reform. In so doing, the majority has decided, wrongly, an issue that neither this court nor the district court should have reached in the first place. The majority has substituted its opinion for the careful judgment of the Hawaii state courts, and the Hawaii legislature, in "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *Canton v. Spokane School Dist.* # 81, 498 F.2d 840, 845 (9th Cir.1974), citing *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 498, 61 S.Ct. 643, 644, 85 L.Ed. 971 (1941). The majority has interfered with a state legislature's exercise of a power which is "an inherent attribute of sovereignty." *County of San Mateo v. Coburn*, 130 Cal. 631, 634, 63 P. 78 (1900), and which is "'universally' recognized and 'necessary to the very existence of government.'" *City of Oak-*

¹⁰"For a man's property is not at all secure, though there be good and equitable laws to set the bounds of it between him and his fellow subjects, if he who commands those subjects have the power to take from any private man what part he pleases of his property, and use and dispose of it as he thinks good." J. Locke, *The Second Treatise of Government (An Essay Concerning the True Original, Extent and End of Civil Government* 138 (J. Gough 3d ed. (1966) at 71)).

land v. Oakland Raiders, Ltd., 32 Cal.3d 60, 64, 183 Cal. Rptr. 673, 646 P.2d 835 (1982). "The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied by its fundamental law." *Kohl et al. v. United States*, 91 U.S. 367, 372, 23 L.Ed. 449 (1875). The majority labels the Hawaii legislature's attempt to exercise this fundamental sovereign power a "tyranny of the majority." But "concrete cases are not to be decided by calling names." *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316, 324 (1st Cir.1946). My research has disclosed no case supporting the conclusion that the statute here at issue is unconstitutional on its face. To the contrary, precedent and common sense both point quite plainly to the opposite conclusion. I therefore dissent.

One commentator has already anticipated the problem that outsiders would have in comprehending the constitutionality of the Hawaii Land Reform Act:

The almost instinctive feeling that the Hawaii Act is radical may be based to some degree on an emotional reaction rooted in the assumption that since land is easily available on the open market to anyone who wants to buy it, no man should be forced to sell his land to another. This assumption, although valid in most parts of continental United States, is not valid in the island State of Hawaii.

One factor that argues in favor of the Act and may be considered by the Court, if only subconsciously, is the current political reality that in much of the world land reform is essential if democratic forms of government are to emerge or to prevail. In both Asia and Latin America it is taken for granted that a redistribution of the land must be accomplished as a vital first step in carrying out reforms that will allow democratic governments to be established and survive. Land reform is necessary for the economic, political, and social health and stability of many of these nations.

It would be anomalous and somewhat hypocritical if the United States Government were to insist that land reform be undertaken in other countries when its own Constitution prevented similar reforms in the American States. True, there is a substantial difference between the State of Hawaii and a country like South Vietnam. The most obvious one is the difference between their economies—there are no peasants in Hawaii. But to recognize that difference is not to say that for the long-term political and economic health of Hawaii, land reform here is not as necessary as land reform is to the long-term development of South Vietnam. The existence of a monopoly that can control scarce land resources in Hawaii is dangerous because control of land in an island State represents more than the economic power that the land represents in dollar value.

The state's right to control other types of monopolies is clear; Hawaii's right to control and break up a land monopoly should be at least as clear considering the greater danger such monopoly poses to the political and economic health of an island State.

Conahan, *Hawaii's Land Reform Act: Is It Constitutional?*, 6 Hawaii B.J. 31, 53 (1969) [hereinafter cited as *Hawaii's Land Reform Act*].

The majority begins by asking the wrong question. It believes that it "must decide whether the Federal Constitution permits a state to take the private property of *A* and transfer its ownership to *B* for his private use and benefit." Maj. op., *ante*, at 790. But the land reform program does not simply transfer land from one owner to another owner for his private use and benefit; it transfers land from a handful of large owners to numerous small owners. Moreover, the "transfer" here can be accomplished only through the intervention of the Hawaii Housing Authority, which

must find that the transfer accomplishes the public purposes of the Land Reform Act. Thus, the majority's analysis begins with a distorted account of what the statute actually does. The real question in this case is not whether a naked transfer of title solely for a person's private use is an unlawful taking. The real question is whether the legislature of Hawaii may, pursuant to a plan carefully tailored to guarantee due process and just compensation, bring about the redistribution of privately held land where the legislature has found (a) that the concentration of such land in the hands of a few landholders is a cause of great social and economic harm to the public and (b) that the distribution of such land in small parcels to many persons will be to the public's benefit and advantage. Having asked the wrong question, the majority predictably arrives at the wrong answer.

I. COMITY AND FEDERALISM

As I see it, the only questions presented to us by this case are, first, whether the district court should have abstained from deciding it on the merits; and, second, if not, what is the appropriate standard of review to be applied by a federal court in passing upon a facial challenge to a legislature's exercise of the power of eminent domain. The answers to both questions emanate from the joint principles of judicial restraint, comity and federalism, which counsel courts not to interfere unnecessarily with the exercise of legislative functions by substituting their judgment for that of legislatures on primarily legislative functions, and which counsel the federal courts not to interfere unnecessarily with the exercise of fundamental state powers.

Issues concerning land use within a state are not easily made a subject of federal concern. It is an essential attribute of a state's sovereignty to be able to use land to promote the commonweal. That is why a state may take

land for a public use. Whether land is used to promote the common good must invariably depend on facts and circumstances that will vary from state to state.

Abstention, and, failing that, deference to legislative judgment, was uniquely appropriate in this case not only because the Land Reform Act is significant to the Hawaiian people, but because the case will now have an unfortunate impact on any future attempt by any state to experiment with land reform, regardless of whatever compelling needs may exist in a particular state. Hawaii faces a very difficult land situation. Judicial modesty should prevent us from thinking that we are in a better position than the Hawaiian legislature and courts to judge the effectiveness and constitutionality of any attempt at reform.

The majority ignores the nature of our federalist compromise. The Constitution could have decided that states are merely administrative organs of the central government, but in fact the Constitution decided otherwise. States have been granted independent law-making power, the purpose of which is to provide their people with public benefits and services. There can be no more basic "benefit" than land.

One advantage often cited in favor of our federal system is that it allows a high degree of free play to the states. "It is one of the happy incidents of the federal system," Justice Brandeis wrote, "that a single courageous state may if its citizens choose serve as a laboratory and try social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 387, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting).

The Hawaii Land Reform Act is an important state experiment. The recognition that control over land is crucial to the existence of "the state as a state" is implicit in federal court decisions abstaining in state eminent domain proceedings. As the majority recognizes, *citing Louisiana*

Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28, 79 S.Ct. 1070, 1073, 3 L.Ed.2d 1058 (1959), "a state's eminent domain proceeding is intimately involved with sovereign prerogative." Maj. op., *ante*, at 789, n. 1.

The power of eminent domain is a fundamental sovereign power of the states. Its exercise has always been a legislative function. The majority's decision to declare facially unconstitutional the statute before us is thus an extraordinary exercise of the federal judicial power. I find nothing in the statute so extraordinarily offensive as to call for such an exercise.

II. ABSTENTION

Abstention is appropriate in this case, basically, because without it the federal courts will be interfering unnecessarily in state judicial processes and judgments. Several more particular reasons for abstention are apparent upon closer examination.

A. *Younger* Abstention.

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny, teach that the federal courts ought to abstain from deciding cases which implicate important state interests, when those same issues are the subject of current adjudication in the state courts. Where state criminal proceedings are begun against federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the abstention principles of *Younger* apply in full force. *Hicks v. Miranda*, 422 U.S.332, 349, 95 S.Ct. 2281, 2291-92, 45 L.Ed.2d 223 (1975). Today, seventeen years after *Hicks*, the policies underlying *Younger* are fully applicable to non-criminal judicial proceedings when important state interests are involved. *Middlesex County Ethics Committee v. Garden State Bar Association*, U.S., 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). In the

instant case, state court proceedings were pending before any proceedings of substance on the merits had taken place in federal court.

State administrative proceedings preceded the plaintiffs' filing of their complaint herein in federal district court. On April 22, 1977, pursuant to the statutory requirements of the Hawaii Land Reform Act, a public hearing was held on the proposed acquisition of Tract H. On October 20, 1978, the Hawaii Housing Authority made statutorily required findings that acquisition of tract land would effectuate the public purpose underlying the Hawaii Land Reform Act. On October 23, pursuant to statute, the Trustees were directed to negotiate the sale of tract land. On January 18, 1979, the Hawaii Housing Authority declared that negotiations had failed. On January 22, 1979, the Hawaii Housing Authority ordered mandatory negotiations, a move that was later enjoined by the federal district court. Meanwhile, in *Midkiff v. Amemiya*, Civ. No. 47103 (Hawaii Ct.App. filed June 29, 1978) (complaint of the Trustees of the Bishop Estate asking for declaratory judgment), Judge Lum issued extensive findings of fact and upheld the constitutionality of the Hawaii Land Reform Act.

Not until February 28, 1979 did the plaintiffs in the instant case file their complaint in federal court. On November 14, 1979, the district court held a hearing on the initial motion for summary judgment. But by then, three condemnation suits were already pending in the state court. Civ. Nos. 59201, 59202 & 59191. These suits were eventually settled. On April 3, 1980, a subsequent motion for partial summary judgment was heard in the federal district court. However, by then, a fourth condemnation proceeding was pending in the state courts. Civ. No. 60465. On June 10, 1980, the district court issued a final judgment and permanent injunction, *Midkiff v. Tom*, 483 F.Supp. 62 (D.C. Hawaii 1979). The fourth condemnation proceeding, however, was not settled until September 1981.

As of October 18, 1981, the date upon which we heard oral argument in this case, condemnation suits encompassing eighteen of the Trustees' subdivisions were pending in state courts. Thus, condemnation suits were continuously pending in the state courts from *before* the federal district court heard the initial motion for summary judgment until after we took this appeal under submission. It appears that such suits are still pending now.

On November 9, 1981, an interlocutory appeal was taken to the Hawaii Supreme Court on the issue of whether a particular condemnation under the Hawaii Land Reform Act was being done for a public purpose. *Hawaii Housing Authority v. George Li Brown*, Civ. No. 60945, Supreme Ct. No. 8489. In that case, the Hawaii Supreme Court denied lessees' motion to dismiss landowners' attack on the constitutionality of the Hawaii Land Reform Act. In so doing, the court stated, "it appears that the law does not favor the waiver of a claim that a statute is unconstitutional The constitutional issue in this case is of course an issue of public importance."

Citing both *Younger* and *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), the Seventh Circuit held that a district court properly refrained from interfering with pending state court eminent domain proceedings. *Ahrensfield v. Stephens*, 528 F.2d 193 (7th Cir. 1975). Citing also *Louisiana Power & Light Co. v. City of Thibodaux*, *supra*, the court noted the sensitive nature of federal court intervention in a state's eminent domain system. Also cited with approval was *Creel v. City of Atlanta*, 399 F.2d 777, 779 (5th Cir. 1968), which stated in reference to a federal constitutional challenge proceeding simultaneously with a state court condemnation proceeding:

[T]he principal and essential issue is one properly for determination by the state courts. Not only is munic-

ipal eminent domain ordinarily a local matter, but it is difficult to imagine a situation where more confusion would arise than would be the case if the parties here were allowed to simultaneously pursue both this action and the state condemnation proceeding.

Ahrensfeld, supra, at 198. The *Ahrensfeld* court reasoned that, since the plaintiffs were able to raise the crux of their federal constitutional claims in the pending state action, federal court intervention was unnecessary.

Since important state interests are involved in the implementation of a state's land use policy, *Younger* abstention is fully applicable here:

The importance of the state interest in the pending state judicial proceeding and in the federal case calls *Younger* abstention into play. So long as the constitutional claims of respondents can be determined in the state proceedings and so long as there is no showing of bad faith harassment or some other extraordinary circumstances that would make abstention inappropriate, the federal courts should abstain.

Middlesex County Ethics Committee v. Garden State Bar Ass'n, supra, U.S. at, 102 S.Ct. at 2523. The constitutional issue in the case before us has been and remains before the Hawaii courts. Clearly the proper route of review for the instant case would have been up the state court ladder and then to the United States Supreme Court.

B. *Pullman* Abstention.

Even if there were no ongoing state proceedings requiring abstention under *Younger*, the principles announced in *Pullman, supra*, would call for abstention in this case. The Court in *Pullman* was confronted with an issue which was "more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." 312 U.S.

at 498, 61 S.Ct. at 644. The Court observed that adjudication of the constitutional question might be avoided because the case also presented a potentially determinative issue of state law. Under those circumstances, the Court held, the district court ought to abstain from deciding the constitutional issue, as long as it appeared that a definitive ruling on the state issue could be obtained in the state courts "with full protection of the constitutional claim."

Pullman abstention is appropriate here, as there may well be an alternative to adjudicating the federal constitutional challenge to the land reform statute. The question concerning the meaning of public use need not be broached if the Hawaii Land Reform Act permits the state to continue to regulate the condemned property in some way to achieve the public goals of alleviating conditions such as inflation and land shortage. Whether the statute permits any continued regulation is a doubtful and possibly determinative issue of state law. By determining the issue on federal grounds, the majority deprives the state of a legitimate opportunity to uphold the land reform program.

Furthermore, there has been no definitive ruling as to whether the statute is constitutional under the Hawaii Constitution, which has its own "public use" requirement. A judgment by the Hawaii Supreme Court that the statute was in conflict either on its face or as applied, with the Hawaii Constitution, would eliminate forever the need for this or any court to decide whether the statute conforms to the requirements of the federal constitution.

The majority correctly points out that our court will only reverse the district court's refusal to abstain if such a refusal involves abuse of discretion. In the case at hand the district court did "abuse its discretion," and thus this court should overturn the decision. A leading article on abstention doctrine has persuasively argued:

[B]efore abstaining in an authorization case, the federal judge should ascertain whether abstaining will serve any purpose by determining which way he would rule on the state law issue in the absence of abstention. If he would hold the program unauthorized, so that abstention might prevent interference with a state program, he should also ascertain whether the program would suffer irreparable harm from interference. The greater the harm, the more this factor weighs in favor of abstention.

Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. of Pa.L.Rev., 1021 at 1126 (1974). Among the "imprecise factors" to be weighed in making the decision are "the degree of unclarity of state law; the extent to which error might harm a state program; and the extent to which the federal constitutional issue is sensitive and calls for swift adjudication." *Id.*

Here, the federal court's decision that the state's program is unconstitutional will irreparably damage the program. Moreover, the federal constitutional issue is complex and not one that demands immediate adjudication. And there is a possibility of a constitutional construction of the statute. *See* Parts III(C) & (D), *infra*. Thus, in this case the factors weigh in favor of abstention.

In making the decision to abstain in a particular case, a federal court must refer back to our system of federalism. Some issues demand federalization. One thinks, for example, of the rights of women and minorities. Given our national history, women and blacks have suffered harms unique to our nation, not to any given state. Thus, it is not only feasible but necessary to protect such rights on a national basis. Rarely is it appropriate for a court to abstain when it has before it a case addressing rights of women or minorities. *Los Angeles Unified School Dist. v. United States Dist. Court for the Central Dist. of Califor-*

nia, 650 F.2d 1004 (9th Cir.1981) (Ferguson, J., dissenting). Certain kinds of issues are not easy to federalize. Land reform in particular presents a situation in which the problems of each state vary widely. An attempt to federalize takes away from the state an important power and robs its people of any attempt to reach an innovative solution democratically.

III. THE DOCTRINE OF PUBLIC USE

Having wrongly reached the merits in this case, the majority comes to the wrong conclusion about those merits. My analysis of the facts of this case and the applicable law convinces me that the statute under review is constitutional on its face. The majority errs, I think both by mischaracterizing the facts and by misconstruing the applicable law.

A. Standard of Review

If a federal court must consider the merits of a defendant's contention that a taking is not for a public use, the court should apply the proper standard of review. The court must give great deference to the state legislature's determination and to the ruling of the state's highest court. The standard of review is a narrow one. As a consequence:

[T]he Court has never actually held a use to be private which the courts of a state, with their intimate knowledge of local conditions and requirements (and with the concurrence of the legislature or even of the people of the state), have declared to be public.

Nichols, *Eminent Domain* § 7.31[1] [1980]. Of course, this court has been unable to profit from the wisdom of Hawaii's courts, whose judges are intimately knowledgeable about the conditions of that state, because the federal proceeding has aborted the orderly adjudication of issues in the state courts.

The majority is cognizant of precedent requiring great judicial deference to a legislative determination that a use is a public use. *Berman v. Parker*, 348 U.S. 26, 31-32, 75 S.Ct. 98, 101-02, 99 L.Ed. 27; *United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 551-52, 66 S.Ct. 715, 717-18, 90 L.Ed. 843 (1946); *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668, 680, 16 S.Ct. 427, 429, 40 L.Ed. 576 (1896).

The majority, however, incorrectly distinguishes those cases on the ground that they involve the review of a congressional rather than a state legislative determination.

In the most recent of those cases, *Berman, supra*, Congress authorized a taking in the District of Columbia. "The power of Congress over the District of Columbia," the Court specifically noted, "*includes all the legislative powers which a state may exercise over its affairs.*" *Berman, supra*, 348 U.S. at 31, 75 S.Ct. at 102 (emphasis added). In delimiting the scope of judicial review in eminent domain cases, the *Berman* Court referred to the narrow role that courts play in reviewing *state* legislation:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs. . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Berman, supra, 348 U.S. at 32, 75 S.Ct. at 102 (emphasis added). In light of the firm language in *Berman*, I believe that it is not within our province to usurp the role of Hawaii's legislature.

The rule of deference was also set forth in *Welch, supra*, a case that preceded *Berman*. A commentator has remarked:

[I]t could be argued that the Court in *Welch* was reserving to itself a greater discretion to review the acts of state legislature in this area, but it seems clear that the reserve power of the state in this area is greater than the power of the federal government when the federal government is acting within the boundaries of a state (in *Welch* the federal government condemned land in a state).

Hawaii's Land Reform Act, supra, at 37. Finally, *Gettysburg Electric Railway, supra*, 160 U.S. at 680, 16 S.Ct. at 429, cited with approval the rule "that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." The Court in *Gettysburg* borrowed that rule from a standard work on municipal corporations—hardly a repository of lore about judicial review of congressional action.

The majority is unquestionably correct that it lies with the judiciary to make the ultimate determination of whether a use is public. This is merely a restatement of the principle of judicial review established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). However, the majority is sadly mistaken if it believes that a restatement of the obvious negates the rule of judicial deference in eminent domain cases.

B. The *Fallbrook* Approach

The majority's approach to reviewing the taking issue comes closer to the mark when it states, "we must look at each case on an ad hoc basis," and quotes the language in *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 159-60, 17 S.Ct. 56, 63, 41 L.Ed. 369 (1896), "[W]hat is a public

use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned." Unfortunately, the majority never analyses this case on the basis of its own particular facts and circumstances. Instead, the majority applies five mechanistic rules, described as "recurring facts and circumstances," derived from other cases. But general propositions do not decide concrete cases.

Before further considering the majority's wrong approach, it is instructive to consider the right approach of *Fallbrook Irrigation District, supra*. In that case, California had passed a law allowing irrigation districts to condemn property. In upholding the law, the court said:

[I]n a State like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances which surround the subject and with the necessities and the occasion for the irrigation of the lands than can any one who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the fact which surround the subject in their own State. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that State on this question.

Id. at 160, 17 S.Ct. at 64. *Fallbrook* is significant in two respects. First, in its emphasis on facts and circumstances, *Fallbrook* points to the significance that the shortage of water, an important state resource, has in determining whether a use is public. Second, *Fallbrook* stresses that the people of a state and members of her legislature have more familiarity than have strangers with the circumstances that justify a taking.

The reasoning in *Fallbrook* was reiterated in *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905). *Clark* upheld a Utah law that gave individual landowners the right to condemn surrounding private land to irrigate their own private land. Shortage of water in Utah also helped to justify the taking. The court again emphasized that peculiar conditions may exist in a particular state, and that great deference is due to the knowledge that a state's citizens possess about local conditions:

Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious and acknowledged in the State, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them.

Id. at 367-68, 25 S.Ct. at 678. Similarly, the state courts and legislature of Hawaii must be assumed to be exceptionally familiar with the land shortages in Hawaii and to have an informed understanding of social and economic consequences that result from this peculiar fact. A review of the Hawaii legislature's findings in this regard is illuminating.

C. The Facts of the Case

In Hawaii, a special problem exists that did not exist in eighteenth century America: Land in that state is concentrated under the suzerainty of a few large landowners. The legislature of Hawaii has specifically found:

(a) The fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 per cent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 per cent of all land.

(b) The small number of landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long-term residential leases. While fee simple ownership still accounted for 68.9 per cent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 per cent of all owner-occupied housing units developed on Oahu had been on leasehold. Between 1967 and 1972, 46 per cent of such development had been on leaseholds. In 1973, leaseholds constituted 32 per cent of all owner-occupied housing, more than double the percentage in 1960.

The foregoing developments have compelled thousands of people in the State to resort to leaseholds to

satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

1975 Haw.Sess.Laws Act 184 § 1, cited in *Midkiff v. Tom*, 471 F.Supp. 871, 876 n. 21 (D.Hawaii 1979). The Trustees as a group are the single largest private landowners on Oahu. They own 15.1% of all land and 22.1% of all privately owned land on the island. *Midkiff v. Amemiya*, Civil No. 47103 (Haw.Ct.App.1978). *Findings of Fact and Conclusions of Law*, June 29, 1978. Much of Hawaii's population is concentrated on the island of Oahu, the island on which Hawaii's most populous city, Honolulu, is located.

The legislature has specifically found that the concentration of land, coupled with the large landowners' policy of leasing rather than selling that land, has undesirable economic and social effects. Among the undesirable economic effects are artificially high prices on leasehold units, the discouragement of the development of fee simple units, inequality of bargaining power that strongly favors the lessor in rental negotiations, and a decline in leasehold value after the renegotiation of leases. 1975 Haw.Sess. Laws Act 184 § 1(d).

The legislature has also found that residential leaseholds have undesirable social effects. In particular, the pattern of renegotiating leaseholds at ever higher and inflated prices aggravates

the already acute need for government-sponsored low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future, and will adversely affect the health and welfare of these people and the general welfare of the people of Hawaii.

The Hawaii's legislature's findings and declaration of purpose are eloquent testimony to the need for a land reform program that will give persons an opportunity to own their own land. The following are excerpts from Hawaii Rev.Stat. § 516-83 (1976):

There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and who have instead engaged in the practice of leasing their lands under long-term leases;

The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State;

Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated[.] . . . Long-term leases . . . contain terms and conditions . . . that restrict their freedom to fully enjoy such land . . .;

The economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated . . .;

. . . [T]he ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions and will promote the economy of the State and public interest, health, wel-

fare, security, and happiness of the people of the State;

... For a growing proportion of Hawaii's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land, whether leasehold or fee. Stabilizing the cost of land, or, at least, slowing the artificial inflation of land values would curb the rising cost of living in Hawaii ...;

The Constitution of the State of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living compatible with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values.

The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few. ...

... Checking inflation, improving the stability of the economy, and forestalling disadvantageous economic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the realization of these public purposes serve a public use since they ultimately benefit the entire community. . . .

The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii. . . .

... The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. . . .

The use of the power of eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose. . . .

Legislation providing to people who are lessees under long-term leases of residential land on which their homes are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

The majority calls none of these findings of fact into question. Indeed, they are scarcely mentioned at all in the majority opinion. They persuade me, however, that the land reform statute which they prompted is well within constitutional limitations. The Hawaii legislature believes that the redistribution of land is necessary to curb inflation, to meet the housing needs of the elderly, and to allow citizens of the state to enjoy fully the land on which their houses are situated. These substantial economic and social goals are legitimate state interests. Given the peculiar facts of land distribution in Hawaii, it cannot be said that the redistribution of land in that state is an arbitrary or capricious means of achieving these interests. I would hold that where property is taken to achieve such substantial benefits for the citizenry, the property is put to a public use.

D. *Eastern Sugar Associates*

A case very much on point is *People of Puerto Rico v. Eastern Sugar Associates*, *supra*. That case upheld the constitutionality of a statute similar to the Hawaii Land Reform Act.

Relying directly on Laws of Puerto Rico Annotated, tit. 28, ch. 31 §§ 241 *et seq.*, a commentator has outlined the purposes of the Land Law of Puerto Rico:

The Puerto Rican Legislature passed the Land Law of Puerto Rico which was designed to break up the corporate latifundia (i.e. large landed estates) in order to improve the economic, political, and social health of the Islands. An Authority was created under the provisions of the Law and was given the power to condemn land. The Authority was instructed to carry out the purposes of the Law by (1) breaking up the latifundia and preventing their reappearance, (2) assisting in the creation of a new class of landowners and farmers, (3) providing means for the *agregados* and slumdweller to acquire parcels of land on which to

build their homes, and (4) taking all actions necessary to achieve the most economic, scientific, and efficient enjoyment of land by all of the People of Puerto Rico. Later the Legislature passed the Vieques Law which directed the Authority to acquire the land of Eastern Sugar Associates on the Island of Vieques.

Hawaii's Land Reform Act, supra, at 38 (footnotes omitted). *Agregados* were heads of families dwelling on land that they did not own.

The Authority filed in a Puerto Rican court a petition to condemn the land of Eastern Sugar Associates. After removal of the case on diversity grounds, the district court dismissed the petition for condemnation. The appeal presented the issue: "[W]hether on the pleadings it can be said that the appellees' land is sought to be taken for a public use." 156 F.2d at 320.

The court in *Eastern Sugar Associates* gave great deference to the determinations of the Legislature of Puerto Rico: "We are not, of course, concerned with the wisdom, expediency, or even directly with the necessity of the uses for which the land is proposed to be taken. These are legislative questions with which it is clearly established we have nothing whatever to do." 156 F.2d at 323.

While giving deference to the Puerto Rican Legislature, the court recognized:

Some public benefit or advantage must accrue from the transfer and mere financial gain to the takers is not enough, since the Supreme Court has intimated that the power of eminent domain cannot be used by the taking authority in aid of "an outside land speculation." . . . But the local Legislatures nevertheless have wide scope in deciding what takings are for a public use.

Eastern Sugar Associates, supra, at 323.

The deference owed to the Puerto Rican Legislature, like that owed to Congress when it acts in the District of Columbia, *see Berman v. Parker, supra*, is easily explained: Congress conferred powers on the Puerto Rican Government which are "nearly, if not quite, as extensive as the general residual powers of a state." *Eastern Sugar Associates, supra*, at 322.

The majority, attempting to distinguish *Eastern Sugar Associates*, makes much of the individual uses described in the Puerto Rican legislation to argue that the land that was taken underwent a change in use. However, the court in *Eastern Sugar Associates* refused to consider individually the particular uses:

Each use plays a part in a comprehensive program of social and economic reform. *Thus we see no basis for analyzing each case separately. Instead we think the entire legislation should be regarded "as a single integrated effort," . . . to improve conditions on the island,* and so viewed we think enactment of the statutes within the power of the Insular Legislature.

Id. at 316 (citation omitted and emphasis added).

The court in *Eastern Sugar Associates* rejected the argument "that due process is denied because the purpose for taking the appellees' land is only to sell or lease it to others for them to use personally instead of for use by the general public." *Eastern Sugar Associates, supra*, at 316. The court found that this argument had already been rejected several times in Supreme Court cases: *Rindge Co. v. Los Angeles*, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186 (1923); *Vernon Cotton Co. v. Alabama Power Co.*, 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916); *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906); *Clark v. Nash, supra*; *Fallbrook Irrigation District, supra*.

E. The Majority's Incorrect Approach

Even though the taking clause speaks of "public use," language that is broad in scope and not encompassed by a check list, and even though the precedents require an *ad hoc* approach, the majority nevertheless propounds five tests, drawn, it says, from the cases, by which to determine whether the use here is public. I turn now to a brief examination of the majority's check list:

1. *Historically accepted public use.* This test is helpful only in those simple cases that represent no expansion of past public uses. But as the majority itself recognizes, the law of eminent domain had very humble beginnings in mill acts and in the building of roads. The history of public use has been a history of the expansion of the concept to accommodate new circumstances. Eminent domain has been used to condemn slum areas, *Berman v. Parker, supra*; to distribute land to squatters, *People of Puerto Rico v. Eastern Sugar Associates, supra*; and to condemn a football league franchise, *City of Oakland v. Oakland Raiders, Ltd., supra*.

2. *Change in the use of land.* The majority acknowledges that the Hawaii Land Reform Act may change the use of land; after condemnation, the land would be used exclusively for residential rather than investment purposes, and persons who own land outright are likely to treat it differently than tenants would. Maj. op. *ante*, at 796-797. The majority then offers the non-sequitur that these "alleged changes in use . . . are simply different forms of *private* use."

This argument by label, namely, that the change in use is merely a change in private use, conceals a serious confusion. The word "use" is susceptible to two entirely different meanings, namely, "employment" and "advantage."

There may be a change in private use, in the sense of a change in the private employment of land, such that a

public advantage is conferred sufficient for the courts to hold that the land is now put to public use: the new private use in which the land is employed yields a public advantage. This occurred, for example, in *Clark v. Nash, supra*, a case in which an individual condemned private land to irrigate his own land. To dismiss an actual change in use as a mere change in "private use" is to ignore the possibility that a public advantage is thereby gained. The issue is whether the public advantage gained by a change in the private employment of land yields a public use.

3. *Change in possession.* The majority notes that a change in possession commonly occurs after a taking, then promptly cites two cases that undermine the rule.

In the instant case, continuous possession by the housing tract leaseholders is significant only because it favors their equities by diminishing possible hardships to the property owner. Whatever hardships might specifically burden a property owner who loses possession of house and land cannot be present in this case.

4. *Taking by the government.* The ultimate beneficiary of a valid taking is not the government: it is always the public. A taking by the government merely provides some insurance that it will be the public who benefits. To be sure, there is a danger, to which the courts must be alert, when the power of eminent domain is delegated to a private corporation. *United States v. Gettysburg Electric Ry. Co., supra*, 160 U.S. at 680, 16 S.Ct. at 429.

In the instant case, however, the state has not delegated authority to a private corporation. Indeed, insurance that the public will benefit is provided by the Hawaii Land Reform Act, which requires the Hawaii Housing Authority a governmental body, to find that the purposes of the Act will be effectuated by a taking, and which vests discretion in the Authority, not in private individuals. Haw.Rev.Stat. § 516-22.

5. *De minimis taking.* The majority notes that courts have upheld the condemnation of land where the taking is *de minimis* and for the purpose of facilitating the development of nearby land. The majority cites two cases. Need one add that courts have upheld numerous takings that were not *de minimis*?

The sovereign powers of a state exist to promote the health, welfare, security and happiness of the people of the state—in sum, to promote the public interest. Whether the Hawaii Land Reform Act has been wisely chosen as a means for achieving the legislature's objectives is not for us to say.

Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 564, 31 S.Ct. 259, 261, 55 L.Ed. 328 (1911).

CONCLUSION

I believe that the land reform program enacted by the Hawaii Legislature does not result in an unlawful taking of property. I also believe, however, that instead of reaching the merits of this question, the majority should have abstained in favor of ongoing state judicial processes. On both grounds I therefore register my dissent.

Appendix B

Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki and Myron B. Thompson, Trustees of the Kamehameha Schools/Bishop Estate, Plaintiffs,

v.

Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N. C. Ing, Nobuyoshi Tamura, Andrew I. T. Chang, and David C. Slipher, Commissioners of the Hawaii Housing Authority; Franklin Y. K. Sunn, Executive Director of the Hawaii Housing Authority; and Hawaii Housing Authority, Defendants,

and

Wai-Kahala Tract "H" Association, Inc.; Halawa Hills Landsale Committee; Awakea Association; Alii Shores Community Association; Enchanted Hills, Unit I; Portlock Community Association (Maunalua Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Association; Kalama Valley Community Association; Maunalua Triangle-Koko Kai Community Association, Inc.; Hahaione Valley Community Association, Inc.; Kamiloiko Community Association; Lunalilo Marina Community Association; Mariners Ridge and Cove Fee/Lease Conversion Committee; Spinnaker Isle Association; Waialae Iki Community Association; Waian Community Association; Kahala Community Association, Inc.; Kahala Community Fee Purchase Fund and Halawa Valley Estates Fee Conversion Corporation, Interveners.

Civ. No. 79-0096.

United States District Court,
D. Hawaii

Dec. 19, 1979.

AMENDED MEMORANDUM DECISION

SAMUEL P. KING, Chief Judge.

The Trustees of the Estate of Bernice Pauahi Bishop¹ filed suit in this Court on February 28, 1979, against the Commissioners and Executive Director of the Hawaii Housing Authority and the Hawaii Housing Authority itself, claiming the Hawaii Land Reform Act, now chapter 516 of the Hawaii Revised Statutes, was unconstitutional. Chapter 516 allows the State to use the power of eminent domain in order to condemn certain residential land and then sell it to the residential lessees. The Hawaii Housing Authority is given the power and duty to carry out the provisions of chapter 516.

In Hawaii, a few landholders, including the Bishop Estate, own large tracts of residential land. It has been the policy of these landholders to offer long-term leases to individual lessees, rather than to offer residential lots in fee. Although in recent years some of the leased land has been sold to individual lessees, much of the land is still not available for purchase. The Legislature of the State of Hawaii viewed this system of landholding as injurious to the well-being of the people of Hawaii, and adopted chapter 516 in order to allow long-term residential leaseholders the opportunity to buy in fee the land they occupy under a lease.

One of the provisions of chapter 516 provides for a compulsory arbitration procedure that sets the compensation to be paid the fee owners when the land is condemned. A broad temporary restraining order was issued by me on February 28, 1979, and a modified temporary restraining

¹In 1887 Princess Bernice Pauahi Bishop, the last lineal descendant of King Kamehameha the Great, established by Will the Kamehameha Schools/Bishop Estate. The Estate is a perpetual educational trust for the support of two schools, one for boys and one for girls, known as the Kamehameha Schools.

order, enjoining only the implementation of the mandatory arbitration provisions of the statute, was issued on March 27, 1979. A preliminary injunction, declaring those provisions unconstitutional was issued on May 8, 1979. D.C., 471 F.Supp. 871. In my opinion of May 8, 1979, I indicated that the remainder of chapter 516 was probably constitutional. Plaintiffs' constitutional challenge to the remainder of the statute is that the taking of property for the purpose of reselling it to the residential lessees is not for a public purpose, and hence violative of the Fifth Amendment command: "[N]or shall private property be taken for public use, without just compensation."

Plaintiffs have urged this Court to conduct a trial, weigh evidence, and make what is in essence an *a priori* determination of whether the takings authorized by chapter 516 are for a public use. Plaintiffs intend to show that each and every legislative rationale for the statute is wrong.² They claim that if all the economic justifications for the statute are disproved, all that is left are social justifications—such as the social engineering goal of land redistribution. These social goals, contend the plaintiffs, cannot alone justify the taking as being for a public use. Plaintiffs concede that the legislative findings as to the economic justifications for the statute should be given deference, but argue that the standard for determining whether the taking is for a public use is *not* whether the legislative findings have a rational basis. They do not point to any particular standard to be used by the Court, except to say that the Court must make a new judicial determination. The plaintiffs indicated at oral argument they view the question of whether the taking is for a public use as an economic and factual question rather than a legal one.

²Haw.Rev.Stat. § 516-83 (1976) contains a long list of legislative findings and declarations of purpose and necessity relating to chapter 516.

This Court disagrees. I must make a judicial determination of whether the taking is for a public purpose, but that determination is limited in scope to the question of whether the plaintiffs were denied substantive due process. The goal, the purpose, the *raison d'être* of the statute must be within the purview of the State's police power, and the means chosen by the Legislature to achieve that goal must not be arbitrary, capricious, or in bad faith. If the Court determines (1) that *any* possible rationale for the statute, expressed or not, is within the bounds of the State's police power, and (2) that the statute is not arbitrary or the product of legislative bad faith, then the statute is constitutional.

The starting point in any legal analysis is *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). In that case the Supreme Court held constitutional the District of Columbia Redevelopment Act of 1945. The Act provided for the comprehensive use of the eminent domain power to redevelop slum areas, and also provided for the possible later sale or lease of the condemned lands to private interests. The Court discussed whether the takings authorized by the Act were for a public purpose.

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia [citations omitted] or the States legislating concerning local affairs. [citations omitted] This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. [citations omitted]

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.

348 U.S. at 32, 75 S.Ct. at 102. The Supreme Court viewed the question of whether the takings were for a public purpose in the same way that it viewed any substantive due process claim. The key question was whether the object of the statute was within the police power authority of the legislature.

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. [citations omitted] Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.

348 U.S. at 33, 75 S.Ct. at 103.

Some courts have taken an extremely narrow view of the judiciary's role in determining whether a taking is for a public purpose. In *United States v. 416.81 Acres of Land*, 514 F.2d 627 (7th Cir. 1975), Mr. Justice Clark was considering a claim that a taking was not for a public purpose because it was in aid of a commercial project.

Though appellant's statement pieces together and rewrites different grounds from different objections, we will accept his version as the strongest presentation

of his dual claims that the proposed taking was not for a public purpose and was arbitrary and capricious. Even under these circumstances, however, he has not alleged any sufficient defense. *The only question for judicial review in a condemnation proceeding is whether the purpose for which property was taken is for a Congressionally authorized public use.* [citations omitted] It is not for the courts to review the necessity of the taking. [citations omitted] Nor is it for the courts to consider broadside allegations that the purported public use to be served is merely a pretense or a sham to cover arbitrary official conduct. [citations omitted] Only in cases of egregious bad faith will the the right to condemn be denied [citation omitted] for in those circumstances the taking may not be for a "public" use at all.

514 F.2d at 631-32 (emphasis added) Justice Clark's view was that courts could nullify a taking as not being for a public use *only* in the case of bad faith. There is no bad faith alleged in this case, and were this Court to adopt Justice Clark's test, the inquiry into the constitutionality of the statute would end immediately. However, some cases in this Circuit have indicated that judicial review may extend to the question of whether the taking is arbitrary and capricious.³

There are cases similar to Justice Clark's that indicate judicial inquiry ends when it is determined that a taking is for a Congressionally authorized use,⁴ other cases that

³See *Southern Pacific Land Co. v. United States*, 367 F.2d 161 (9th Cir. 1966), cert. denied, 386 U.S. 1030, 87 S.Ct. 1478, 18 L.Ed.2d 592 (1967); *United States v. 18.2 Acres of Land*, 442 F.Supp. 800 (E.D.Cal.1977).

⁴See, e.g., *United States v. 255.25 Acres of Land*, 553 F.2d 571, 572-73 n. 2 (8th Cir. 1977).

indicate inquiry is limited to determinations of bad faith or arbitrary action,⁵ still others that say police power/due process standards are to be used in determining whether a taking is for a public purpose,⁶ and even cases that pay lip service to the proposition that a government taking for purpose of transferring condemned property to private hands is not necessarily for public purpose.⁷

After carefully considering all these cases, the Court has determined that the proper test to be used is that suggested by *Berman*—a police power/due process analysis. It would be irrational to have all government interferences with property rights except eminent domain judged by a substantive due process test, while eminent domain is judged by something else—whether stricter or not. Plaintiffs have cited many cases for the proposition that courts have great latitude in making judicial determinations of what is public use. These cases, however, were almost all decided before

⁵*United States v. 58.16 Acres of Land*, 478 F.2d 1055, 1058-59 (7th Cir. 1973); *United States v. Agee*, 322 F.2d 139, 142 (6th Cir. 1963) (language of case somewhat unclear but seems to indicate that judicial determination of public purpose is limited to questions of bad faith or arbitrary action); *Amen v. City of Dearborn*, 363 F.Supp. 1267, 1278 (E.D.Mich. 1973), *rev'd*, 532 F.2d 554 (6th Cir. 1976) ("We note that the court has no power to go beyond a determination that the legislative body has acted in bad faith or in an arbitrary manner").

⁶*People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946); *United States v. 67.59 Acres of Land*, 415 F.Supp. 545, 548-50 (M.D.Pa. 1976).

⁷*Washington-Summers, Inc. v. City of Charleston*, 430 F.Supp. 1013, 1014-15 (S.D.W.Va. 1977) ("[I]t is equally clear that property cannot be taken by eminent domain for a predominantly private purpose"); *Amen v. City of Dearborn*, 363 F.Supp. 1267, 1279 (E.D.Mich. 1973), *rev'd*, 532 F.2d 554 (6th Cir. 1976) ("[I]ndustrial and commercial use by itself does not constitute a public purpose").

1930. At that time, to say the least, it took very little to invalidate a statute on substantive due process grounds. On the other hand, I believe those courts that say judicial review is extremely limited do so because they cannot conceive of legislative actions that are neither arbitrary nor in bad faith, yet still outside the limits of the police power. If the object of chapter 516 (or any one of several objects) is to further the health, safety, morals, or general welfare of the people of Hawaii, and if the means chosen to accomplish that object are rational and not in bad faith, the statute is constitutional.

Hawaii, as discussed earlier, has an uncommon system of landholding. A substantial part of all residential land is held by a few interests and leased to a large number of residential lessees. Plaintiffs, Trustees of the Bishop Estate, hold a significant portion of the residential land on Oahu. Section 516-83 of the Hawaii Revised Statutes is entitled "Legislative findings and declaration of necessity; purpose" and in it the Legislature sets forth numerous economic and non-economic rationales for chapter 516. Plaintiffs argue that they can demonstrate that all the economic justifications for the statute are incorrect, and that the Legislature was wrong in enacting the statute. Yet, in order to uphold the constitutionality of chapter 516, this Court believes all it need do is look at the broadest possible rationale for the statute—that of redistributing residential land and changing the pattern of residential ownership in Hawaii. I believe this purpose is within reach of the police power, and hence the takings authorized by the statute are for a public purpose. All that the Court need rely on in the way of evidence to support this conclusion is the system of landholding in Hawaii—the concentration of land in a few large landholders. At the preliminary injunction hearing, there was testimony and documentary evidence concerning the way land is held in Hawaii. The Court believes that given this system of landholding, the Legis-

lature had the right, pursuant to its police power, to conclude that the general welfare of the people of Hawaii was served by condemning the land of large landholders-lessors and allowing the lessees to purchase that land from the State. The Legislature had the right to conclude that Hawaii's system of landholding was injurious to the social and economic health of the community.

In *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946), the Legislature of Puerto Rico enacted the Land Law of Puerto Rico, a far-reaching program of agrarian reform that provided for the condemnation of privately owned land, and for its sale to private parties for residential use and farming. The Vieques Act, also passed by the Legislature of Puerto Rico, provided for the acquisition of land on two outlying islands for the purpose of renewing their sugar industry and establishing a distillery. Pursuant to these Acts, Puerto Rico petitioned the court to condemn 3100 acres of land held by Eastern Sugar Associates. Eastern Sugar challenged the condemnation, claiming the taking was not for a public purpose. The court first concluded that the test for determining public use was a due process test—not some *a priori* judicial determination of public purpose. The court noted that “a taking of property from one, for the purpose of transferring it to another, without anything more, [does not necessarily conform] to due process of law.” 156 F.2d at 323. However, all that was needed was “some public benefit or advantage” other than mere financial gain for the state. *Id.* The court then went on to note:

In the first place a state's power of eminent domain does not necessarily have to be rested upon the ground that the taking is considered necessary for the public health, but may be exercised if the taking “be essential or material for the prosperity of the community.” [citation omitted] And in the second place

a local Legislature, because of its intimate knowledge of local conditions, has great latitude in determining what uses of land are conducive to community prosperity. . . . This [program] may be, as the appellees contend, "state socialism." But concrete cases are not to be decided by calling names. Our function is to pass upon the statutes before us without regard to our views of the wisdom of the political theory underlying them; [citation omitted] it is our duty to determine whether their enactment rested upon an arbitrary belief of the existence of the evils they were intended to remedy, and whether the means chosen are reasonably calculated to cure the evils reasonably believed by the Legislature to exist.

156 F.2d at 324. In this case, the purpose of the statute is in no way to confer immediate monetary gains upon the State as some sort of land speculator. Looking only at one social goal of the legislation—that of redistributing the land—this Court could never say, regardless of how much "evidence" was presented by the plaintiffs, that the Legislature's belief in the social evils to be combated by chapter 516 was arbitrary. Social benefit alone is enough to bring a statute within the purview of the police power. It is true that the Puerto Rico statutes were a broader effort on the part of the Puerto Rico Legislature than was chapter 516 on the part of the Hawaii Legislature. It is true that the Puerto Rico statutes were more comprehensive than chapter 516, and were enacted to combat what were perhaps more serious evils. Yet, it is the Legislature's province to determine just how far to go in trying to solve a problem or series of problems. There are limits to legislative line drawing—those imposed, by, *inter alia*, the equal protection clause—but those are not at issue in this case. What is at issue is the right of the Legislature to conclude, as it did, that "The State's acquisition of residential lands held in fee simple, through the exercise of the power of

eminent domain, for the purposes of this chapter is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii." Haw.Rev. Stat. § 516-83(10) (1976).

In *Government of Guam v. Moylan*, 407 F.2d 567 (9th Cir. 1969), the court was considering a Guam redevelopment plan. Prior to World War II, Agana, the capital of Guam, was a patchwork of streets and lots going every which way. Agana was almost completely destroyed in the war, and the government decided to rebuild it. The government wanted, however, to have straight streets and lots. In order to achieve this goal, it condemned land simply to force consolidation of the odd lots. Its purpose was not to hold the land for any particular reason, but rather to sell the new even lots, after condemnation, to private individuals. The Ninth Circuit found that this constituted a public purpose. It is difficult for this Court to see how condemning land to have even streets is more for a public purpose than condemning land so that a large number of long-term lessees can have the opportunity to own the land they live on. Certainly the Hawaii Legislature's determination that the social well-being of the people of Hawaii is served by land redistribution is entitled to as much deference as was given the determination that the social and/or economic well-being of the people of Guam was served by having straight streets.

If the goal of the statute—that of land redistribution—is within the ambit of the State's police power, then the only remaining question for the Court is whether the means chosen to achieve that goal are arbitrary. There has been no suggestion by the plaintiffs that if land redistribution is a public purpose the statute is nonetheless arbitrary. There are of course some lines drawn, but line drawing is always necessary in social legislation, and the scope of the Court's review of where those lines are drawn is very

narrow. This Court finds that the Legislature's determinations of what land is subject to condemnation and who is entitled to repurchase from the State are in no way arbitrary or capricious.

Even were this Court's view that land redistribution constitutes a permissible public purpose encompassed by the police power incorrect, the Legislature has propounded many economic justifications for the statute. The following are excerpts from Haw.Rev.Stat. § 516-83 (1976).

[S]erious shortage of fee simple residential land

[A]rtificial inflation of residential land values in the State

[T]he people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated

[The leases] restrict their freedom to fully enjoy [their] land and . . . are weighted heavily in favor of the few landowners of such land

The economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values

If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values. . . .

Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention . . . will help satisfy the pressing public necessity for a secure, strong and stable economy. . . .

The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter.

These are just some of the justifications for the act that are set forth in § 516-83. There is no doubt at all that these economic rationales such as lowering prices and curbing inflation, are clearly encompassed by the police power. This has been the law of the land since the New Deal. The only question for judicial consideration is whether the means chosen by the Legislature to achieve these goals—chapter 516—is arbitrary. In order to prevail, plaintiffs must demonstrate that the statute is arbitrary with respect to every possible economic rationale for the statute—stated and unstated. Plaintiffs have indicated that they could call many witnesses to show that the Legislature was wrong—that chapter 516 will not lower prices, curb inflation, or do anything else to help the people of Hawaii. Yet, it is not this Court's function to determine if the Hawaii Legislature was wrong. It is this Court's job only to determine whether the Hawaii Legislature acted arbitrarily in enacting chapter 516. No matter how much evidence plaintiffs were to present, they could not establish that the Legislature was arbitrary with respect to every economic rationale advanced in support of the statute. The Legislature determined that chapter 516 would bring down prices, and in our system of government that determination is for them and them alone to make. There are limits to judicial deference,

but those limits are not even approached in this case. The Legislature simply came up with a plan to improve the quality of life in Hawaii. Whether it was right or wrong is up to the voters, not this Court.

Since the question of whether the takings authorized by chapter 516 are for a public purpose is a legal one, and since this Court has made its determination, there is no point in this case proceeding any further on this issue. Defendants are entitled to summary judgment on the issue of the facial constitutionality of chapter 516, subject to this Court's prior rulings on the statutory provisions relating to mandatory arbitration and just compensation.

Defendants may prepare an appropriate order.

Appendix C

Frank E. Midkiff et al., Plaintiffs,

v.

Paul A. Tom et al., Defendants,

and

Wai-Kahala Tract "H" Association, Inc.,
et al., Intervenor.

Civ. No. 79-0096.

United States District Court,
D. Hawaii.

May 8, 1979.

**DECISION ON MOTION FOR PRELIMINARY
INJUNCTION**

SAMUEL P. KING, District Judge.

The Trustees of the Estate of Bernice Pauahi Bishop¹ filed suit in this court on February 28, 1979, against the Commissioners and Executive Director of the Hawaii Housing Authority² and the Hawaii Housing Authority³

¹Plaintiffs refer to themselves as "Trustees of the Kamehameha Schools/Bishop Estate." The Kamehameha Schools were established in accordance with the wishes of Princess Bernice Pauahi Bishop as expressed in her will. The named plaintiffs are trustees under the will and of the estate of Bernice Pauahi Bishop, deceased, appointed as such by the Supreme Court of Hawaii. See *Kekoa v. Supreme Court*, 55 Haw. 104, 516 P.2d 1239 (1973), cert. denied, sub nom. *Kekoa v. Richardson*, 417 U.S. 930, 94 S.Ct. 2641, 41 L.Ed.2d 233 (1974). The testamentary trust is commonly referred to as the Bishop Estate.

²The Commissioners and Executive Director are sued in their individual and official capacities.

³The Hawaii Housing Authority is "a public body and a body corporate and politic with perpetual existence" which is "placed

itself, praying for a declaration that the Hawaii Land Reform Act⁴ be declared unconstitutional.

A temporary restraining order against implementation of mandatory arbitration was granted pending a hearing and decision on a preliminary injunction.⁵ That hearing was held on April 24-27, 1979.

within the department of social services and housing for administrative purposes." Haw.Rev.Stat. § 365-5(a) (1976). The authority is charged generally with the duty of carrying out the State's responsibilities under state and federal statutes with respect to housing. Haw.Rev.Stat. § 356-7 (1976).

⁴1967 Haw.Sess.Laws Act 307, as amended by 1968 Haw.Sess. Laws Act 46, 1969 Haw.Sess.Laws Act 203, 1971 Haw.Sess.Laws Act 215, 1972 Haw.Sess.Laws Act 2, 1975 Haw.Sess.Laws Acts 184, 185, and 186, 1976 Haw.Sess.Laws Acts 159, 200, and 242, and 1978 Haw.Sess.Laws Act 140. These acts are set forth in Haw.Rev.Stat. ch. 516 (1976). See also: Haw.Rev.Stat. ch. 519 (1976). Plaintiffs attack specifically the provisions of § 516-1(14) (defining "owner's basis"), §§ 516-22 to 24 (authorizing condemnation) and §§ 516-51 to 55 (providing for mandatory arbitration).

⁵A temporary restraining order was issued on February 28, 1979, in the form requested by plaintiffs. Upon reflection, I determined that this order was too broad. At a subsequent conference with counsel, I announced *sua sponte* that I would modify this order to make it clear that steps preliminary to arbitration were not enjoined. The Order Modifying Temporary Restraining Order was entered on March 27, 1979. By stipulation between plaintiffs and (then) defendants dated February 28, 1979, and entered as an order of the court on March 2, 1979, the expiration date of the temporary restraining order was extended from March 10, 1979, to March 14, 1979. A further extension from March 14, 1979, to April 24, 1979, was similarly stipulated to on March 7, 1979, and entered as an order of the court on March 9, 1979. A motion filed on March 20, 1979, by the O'Connor Intervenors to dissolve the temporary restraining order or in the alternative for security in the amount of \$1,000,000 was denied on March 27, 1979. A motion filed on March 20, 1979, by the Bays Intervenors to modify the temporary restraining order was in effect denied on March 27, 1979, by the court's *sua sponte* modification in different language.

Motions to intervene were filed by several Bishop Estate lessee organizations.⁶ All motions were granted on March 23, 1979.

At this stage of the proceedings, the evidence adduced and arguments presented concentrated on the facial constitutionality of Chapter 516 of the Hawaii Revised Statutes.⁷ Some evidence related to the actual application of

⁶On March 7, 1979, by WAI-KAHALA TRACT H ASSOCIATION, INC.; HALAWA HILLS LANDSALE COMMITTEE; AWAKEA ASSOCIATION; ALII SHORES COMMUNITY ASSOCIATION; ENCHANTED HILLS, UNIT I; PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; KALAMA VALLEY COMMUNITY ASSOCIATION; MAUNALUA TRIANGLE-KOKO KAI COMMUNITY ASSOCIATION, INC.; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC.; KAMILOIKI COMMUNITY ASSOCIATION; LUNALILO MARINA COMMUNITY ASSOCIATION; MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE; SPINNAKER ISLE ASSOCIATION; WAIALAE-IKI COMMUNITY ASSOCIATION; and WAIU COMMUNITY ASSOCIATION, all represented by Hoddick, Reinwald, O'Connor & Marrack, hereinafter sometimes referred to as the O'Connor Intervenors.

On March 8, 1979, by KAHALA COMMUNITY ASSOCIATION, INC.; and KAHALA COMMUNITY ASSOCIATION FEE PURCHASE FUND, represented by Carlsmith, Carlsmith, Wichman and Case, hereinafter sometimes referred to as the Bays Intervenors.

On March 12, 1979, by HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION, represented by Kemper & Watts, hereinafter sometimes referred to as the Watts Intervenor.

⁷It was not deemed appropriate to consolidate the hearing on the preliminary injunction with the hearing on the merits, as all parties desired to engage in extensive discovery. While much discovery can probably be avoided by pretrial conferences with the court, certain basic constitutional issues can be addressed immediately on stipulated facts with only limited testimony.

the law, but this was limited to setting the context within which the law was supposed to operate.⁸ For purposes of the hearing, it was agreed that the court could take as true the legislative findings set forth from time to time when this and related laws were enacted or amended.⁹

Chapter 516 authorizes the use of the State's power of eminent domain to permit lessees of residential lots to acquire the fee simple title to their homes.¹⁰ The Hawaii Housing Authority is given the power and duty to carry out the provisions of this chapter.¹¹ The Authority established the position of Land Reform Administrator to handle this function and adopted regulations implementing the statute.¹²

⁸The Bishop Estate is an eleemosynary testamentary trust. The statute in question applies in terms to "all lands leased as residential lots which are owned or held privately or owned by the State or its political subdivisions, except Hawaiian home lands . . . and lands owned or held by the federal government." Haw.Rev. Stat. § 516-2 (1976). For purposes of this hearing, no distinction is made as to the power of the legislature to legislate with respect to the land holdings of a perpetual eleemosynary trust as opposed to the land holdings of private individuals.

⁹Especially, the legislative findings in 1967 Haw.Sess.Laws Act 307 § 1, 1975 Haw.Sess.Laws Act 184 § 1, and 1975 Haw.Sess.Laws Act 186 §§ 1 and 2. 1975 Haw.Sess.Laws Act 186 § 2 is set forth in Haw.Rev.Stat. § 516-83 (1976). For the language of these findings, *see* note 21, *infra*.

¹⁰Haw.Rev.Stat. §§ 516-21 to 45 (1976).

¹¹Haw.Rev.Stat. §§ 516-6 and 7 (1976).

¹²Rule of the Department of Social Services and Housing, Hawaii Housing Authority, State of Hawaii, approved by Governor John A. Burns on November 1, 1968, after a public hearing as required by Haw.Rev.Stat. ch. 6C (1955) (now Haw.Rev.Stat. ch. 91 (1976)), and subsequently amended to reflect statutory changes. The present AMENDED RULE 10 is entitled: A REGULATION PERTAINING TO THE HAWAII HOUSING AUTHORITY OF THE DEPARTMENT OF SOCIAL SERVICES AND HOUSING, IMPLEMENTING ACT 307, SESSION LAWS OF HAWAII, 1967, AS

The Trustees object to the application of this land reform statute to the Bishop Estate lands on three principal grounds. First, they say that the State's power of eminent domain cannot constitutionally be used for the intended purpose in that the benefits derived from such use inure solely to private individuals.¹² Second, they say that the statute unconstitutionally mandates less than fair market

AMENDED BY ACT 46, SESSION LAWS OF HAWAII, 1968; ACT 203, SESSION LAWS OF HAWAII, 1969; ACT 215, SESSION LAWS OF HAWAII, 1971; ACT 2, SESSION LAWS OF HAWAII, 1972; ACT 184 AND ACT 186, SESSION LAWS OF HAWAII, 1975; AND ACT 242, SESSION LAWS OF HAWAII, 1976.

¹²Haw.Rev.Stat. § 516-30 (1976) provides for the sale to a lessee by the Hawaii Housing Authority of the leased fee interest to the lot leased by the lessee after the authority has acquired that leased fee interest. The lessee must qualify pursuant to Haw.Rev.Stat. § 516-33 (1976) and meet certain other requirements. This purpose of the law is spelled out in Haw.Rev.Stat. § 516-83(5) (1976) in the following language:

The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions [set forth in preceding subparagraphs] and will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State.

If a lessee fails to purchase his leased lot, the authority becomes the lessor, subject to all the provisions of law applicable to lessors. Haw.Rev.Stat. §§ 516-30 and 31 (1976). Presumably the authority will not exercise its power to acquire a lessor's leased fee interest unless sufficient activity by lessees has taken place pursuant to Haw. Rev.Stat. § 516-22 (1976) and unless sufficient assurances of purchase by lessees have been received in the form of contracts to purchase as contemplated by Haw.Rev.Stat. § 516-30 (1976) and AMENDED RULE 10 § 17.

value as compensation for the taking of the owner's leased fee interests.¹⁴ Third, they say that the compulsory arbi-

¹⁴1967 Haw.Sess.Laws Act 307 provided in § 13 for payment upon condemnation of "the current fair market value of the tract diminished by the lessees' interests in the leased lots within the tract." A "lessee's interest" or "leasehold interest" was defined in § 2(h) to mean "the current fair market value of all on-site improvements, including all landscaping, walks, drives, walls, fences, buildings and betterments on the surface of the lot, paid for or required to be paid for by the lessee, plus the unamortized current replacement cost of all off-site improvements paid for or required to be paid for by the lessee, determined on the basis of current costs of installation of the same off-site improvements under the circumstances existing at the time of the original installation, and computed on a straight-line basis over the period of the lease, together with the lessee's value increment" The "lessee's value increment" was defined in § 2(i) to mean "the value of his interest in the residential use, enjoyment and amenities of the lot during the balance of the unexpired term of the lease, computed notwithstanding any provision to the contrary in the lease or any other contract; provided that such value shall in no event be less than ten per cent nor more than 15 per cent of the current fair market value of the unencumbered fee of the lot."

1968 Haw.Sess.Laws Act 46 in § 2e redefined the "compensation to be paid for the development tract" of Act 307 § 13 to be "the current fair market value of the tract, valued as if the fee title to the tract were unencumbered and the tract were undeveloped and unsubdivided, plus the unpaid balance owing to the lessor by lessees of the lots in the tract as reimbursement for the actual offsite improvement costs paid for by the lessor; provided, that in no event shall the compensation be less than the sum of the present worth of the future rental income stream under the leases to lots in the tract and the present worth of the lessor's reversionary interest in the leased lots." This act also, in § 2b and c, deleted the earlier definitions of "lessee's interest" and "lessee's value increment" and substituted a definition of "off-site improvements" to mean "all physical improvements such as, but not limited to, roads, sewer lines, sewage treatment plants, and underground electric cables, constructed or placed in a subdivision off the lots intended for occupancy, which improvements are to be used in common by occupants of all lots adjoining such improvements or by occupants of all lots for whose benefit the improvements have been constructed or placed."

1975 Haw.Sess.Laws Act 184 again changed the provisions of Act 307 relating to compensation. Haw.Rev.Stat. § 516-24 (Act 307

tration provisions of the statute violate constitutional guarantees.¹⁵

§ 13) was amended to provide that the "compensation to be paid for the leased fee interest in a residential house/lot within a [development] tract shall be the owner's basis as defined in section 516-1 (14)." "Owner's basis" was a new definition added to Act 307 § 2. This was defined as "the current fair market value of the lost excluding onsite improvements, valued as if the fee title were unencumbered, less the lessee's share, if any, of the current replacement cost of providing existing offsite improvements attributable to the lot, which replacement cost shall include an overhead and profit not exceeding twenty percent of the current replacement cost of the existing offsite improvements, or the original lot development credit to the lessee, whichever is greater, plus the unpaid balance, if any, owing to the lessor by the lessee as reimbursement other than as a part of the lease rent for the actual offsite improvement costs paid by the lessor." The definition of "offsite improvements" was expanded to make it explicit that "gutters, curbs, sidewalks, fire hydrants, street lights, land dedicated for public purposes" were included.

1976 Haw.Sess.Laws Act 242 made the final changes with which we are now concerned. "Owner's basis" was redefined as "the current fair market value of the lot." The definition then went on to provide that the "fair market value shall be established to provide the lessor with just compensation for his interests in the lot and shall take into consideration every interest and equity of the lessee in establishing that market value." The definition continued with language which on its face seems to mandate that this value "shall be determined by whichever following method provides just compensation and gives the greater consideration to the lessee's interest" and sets forth a method "(A)" (a discounted future rental income stream plus a discounted lessor's reversionary interest) and a method "(B)" (current market value less the lessee's interests). This act also provides for mandatory arbitration of compensation in advance of condemnation and that the "effect of the arbitration award and all matters relating thereto shall be prima facie evidence as to just compensation in any condemnation proceedings under this chapter." See note 24 *infra*.

¹⁵Compulsory arbitration appears for the first time in 1976 Haw. Sess.Laws Act 242 § 4, adding a new Part IIA to Haw.Rev.Stat. ch. 516 entitled "MANDATORY ARBITRATION OF COMPENSATION" and consisting of five sections. Arbitration is instituted by

In making a preliminary determination of these issues at this time, I am governed by the test enunciated in *Aguirre v. Chula Vista Sanitary Service*,¹⁶ that is, that a preliminary injunction should issue "upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting preliminary relief.'"¹⁷ I shall analyze each of the listed objections in the light of this teaching from *Aguirre*.

First, I am of the opinion that the State may use the power of eminent domain to redefine, rearrange, or redistribute interests in land.¹⁸ Throughout recorded history,

the Hawaii Housing Authority if voluntary negotiations fail. In this event, assuming the required number of qualified lessees have applied to the authority to purchase the leased fee interest in their residential leasehold lots, "the Hawaii housing authority shall direct the lessor and lessee to submit to mandatory arbitration under chapter 658 [Hawaii's statute on agreements to arbitrate] to establish an amount of just compensation which shall be paid to lessor for the lessor's leased fee interest under section 516-24."

It is interesting to note that the House bill which ended up as Act 242 did not mention arbitration, the Senate amended to provide for arbitration by agreement, and the conference committee reported out a bill with the existing mandatory arbitration provisions.

¹⁶542 F.2d 779 (9th Cir. 1976).

¹⁷*Id.* at 781.

¹⁸*See Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed.2d 1085 (1905) (upholding statutory authority given an individual in Utah to condemn an easement across another individual's land for the purpose of enlarging an irrigation ditch serving the condemnor's land); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906) (upholding statutory authority given a mining corporation in Utah to condemn a right of way for an aerial bucket line across a placer mining claim of another individual); *Mt. Vernon Cotton Co. v. Alabama Power Co.*, 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916) (upholding statutory authority

the manner in which land is permitted to be held and used has been of critical importance to all members of a given society.¹⁹ It is not enough to acquiesce in legislation that looks only to the future. The ingenuity of man could postpone the future to an unacceptable remoteness in time.²⁰

Furthermore, the legislature has defined the public interest and the public purpose behind Chapter 516.²¹ Whether or not the prohibition of the Fourteenth Amendment against depriving any person of property without due pro-

given a power company in Alabama to condemn private property for its purpose); *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (upholding the District of Columbia Redevelopment Act of 1945); *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir. 1946), cert. denied, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946) (upholding Puerto Rico's statutory program for redistribution of land based on the territory's power of eminent domain); *Government of Guam v. Moylan*, 407 F.2d 567 (9th Cir. 1969) (upholding Guam's urban redevelopment statute).

¹⁹See *Public Land Policy in Hawaii: Major Landowners*, Legislative Reference Bureau, State of Hawaii, Report No. 3 (1967); *Public Land Policy in Hawaii: An Historical Analysis*, Legislative Reference Bureau, State of Hawaii, Report No. 5 (1969); *Green v. Frazier*, 44 N.D. 395, 176 N.W. 11 (1920), *aff'd*, 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878 (1920).

²⁰See 3 J. REEVES, HISTORY OF THE ENGLISH LAW 324-25 (2d ed. 1787).

²¹1975 Haw.Sess.Laws Act 186 § 2 (Haw.Rev.Stat. § 516-83). The section reads as follows:

Legislative findings and declaration of necessity; purpose. (a) The legislature finds that:

(1) There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and who have instead engaged in the practice of leasing their lands under long-term leases;

(2) The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State;

Note 21—Continued

(3) Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long-term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land;

(4) The economy of the State and public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated and the required acceptance of such long-term leases of such lands;

(5) The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions and will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State.

(6) The cost of living in Hawaii is and has been high. In recent years inflation has drastically increased the cost of living in the State. The spiraling cost of living affects all people through erosion of the purchasing power of whatever monetary resources they command. For a growing proportion of Hawaii's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land whether leasehold or fee. Stabilizing the costs of land or, at least, slowing the artificial inflation of land values would curb the rising cost of living in Hawaii and, ultimately, contribute to the welfare of all people of the State by improving their standard of living.

Note 21—Continued

(7) The Constitution of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living compatible with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values.

(8) The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few.

(9) Land, in common with other natural resources, is of finite quantity; a fact particularly obvious in Hawaii. In recent decades there has been growing general agreement that the wise conservation, preservation, use and management of exhaustible natural resources such as land are matters mandating an active governmental role. There is an intimate relationship between the monetary values accorded land in Hawaii and the stability and strength of the State's economy as a whole. Land values, artificially inflated by the high concentration of ownership, skew the State economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high land values creates a potential for economic instability and disruption. Economic inflation, instability and disruptions have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and forestalling disadvantageous economic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the

Note 21—Continued

realization of these public purposes serve a public use since they ultimately benefit the entire community. Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention including exercise of the power of eminent domain to acquire fee simple title to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State, will help satisfy the pressing public necessity for a secure, strong and stable economy.

(10) The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this [chapter] is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii.

(11) Inflation lessens the quality of life of all members of this afflicted society and is particularly invidious in its impact on the 90 plus per cent of the population who are in the poverty, and low through middle income groups. The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. There is a pressing public necessity for the State to do whatever it can to curb inflation and to keep the cost of living at a level where it is possible and manageable to provide all citizens a decent and healthful standard of life. The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this [chapter].

(12) The use of the power of eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose;

Note 21—Continued

(13) Legislation providing to people who are lessees under long-term leases of residential land on which their homes are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

(b) It is therefore declared to be necessary and it is the purpose of this chapter to alleviate the conditions found in subsection (a) of this section by providing for the right of any person who is a lessee under a long-term lease of residential land in the State to purchase at a fair and reasonable price the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefor by the State through the use of the power of eminent domain and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State.

1967 Haw.Sess.Laws Act 307 § 1 set forth the first legislative findings in this area as follows:

Findings and declaration of necessity. The legislature finds that:

(a) A prime goal in the United States is the promotion of the public welfare and the securing of liberty as enunciated in the Constitution of the United States through the attainment of fee simple ownership of residential lots by the greatest number of people. Article I, section 2 of the State Constitution recognizes this goal when it states:

"All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property . . ."

(b) During the past few years, Hawaii's economy has expanded greatly and its population has grown rapidly. Concomitantly, the demand for single-family residential lots, especially in the urban areas of the State where the population growth has been concentrated, has increased sharply.

(c) The present-day land ownership system in the State is characterized by a concentration of the fee title to lands in the hands of a few. In the days of the Hawaiian monarchy, all of the lands were held by the Hawaiian kings and chiefs and a few of their faithful followers. While the concentration

Note 21—Continued

of ownership of land in the hands of a few may have been well-suited to the needs of the people in the days of the monarchy, it is hardly suited to the needs of the people in modern Hawaii. Yet, the pattern of concentration of land ownership in the hands of a few has remained essentially unchanged since the days of the monarchy. Today, land ownership is centered not in the monarchical government, but in the hands of a few estates, trusts and other private landowners. At least three-fourths of all privately held land in the State are currently owned by this small group of owners. Much of this land is in the rapidly developing urban areas of the State, where the need for single-family residential lots is critical.

(d) This critical shortage of land had led large landowners to enter into complex arrangements, such as development contracts, master leases, participating leases, subleases and leases with developers. The term and conditions of these arrangements were at that time heavily weighted in favor of the lessors or fee owners against the developers and those who participated in the development or share in the lease rentals. Neither did the participants in the private arrangements or contracts or leases contemplate, at that time, the wholesale condemnation of private leased residential lots by the State as provided in this act.

(e) The few landowners have, over the years, permitted some of their urban lands to be developed into single-family residential lots. However, because of restrictive indentures in instruments creating the various trusts and estates, and because of income taxation problems, the landowners have generally engaged in the practice of leasing, rather than selling in fee simple, the residential lots developed on their lands.

(f) The population growth and the increase in demand for residential lots, and the concentration of ownership of private lands in the hands of a few and their practice of leasing, rather than selling in fee simple, the residential lots developed on their lands, have led to a serious shortage of residential fee simple property at reasonable prices in the State's urban areas and have deprived the people of the State of a choice to own or to take leases to the land on which their homes are situated.

Note 21—Continued

(g) The shortage of single-family, residential, fee simple property, and the restriction on the people of a real choice between fee simple and leasehold residential property have in turn caused land prices for both fee simple and leasehold residential lots to become artificially inflated and have enabled lessors to include in residential leases terms and conditions that are financially disadvantageous to the lessees, restrict unduly their freedom to enjoy their leasehold estates and are weighted heavily in favor of the landlord as against the lessees.

(h) In the next twenty years, it appears that the few, large landowners will continue to permit the development of leasehold, rather than fee simple, residential lots in counties exceeding 100,000 persons in population, unless legislation is enacted to reverse this trend.

(i) Even when the provisions providing for purchase of the fee simple title of residential lots by lessees or the State as provided in this act become effective, neither the lessees nor the State can possibly acquire all leasehold lands. Thus, many of the over 16,000 leasehold contracts now in existence and future leases will remain outstanding, and the economic facts stated above indicate clearly that lessees require certain statutory protection of their fundamental rights to bargain and to otherwise preserve their equitable and legal interests.

(j) The dispersion of ownership of fee simple residential lots to as large a number of people as possible, the ability of the people to acquire fee simple ownership of residential lots at a fair and reasonable price and the ability of lessees of residential leases to derive full enjoyment from their leaseholds are factors which vitally affect the economy of the State and the public interest, health, welfare, security and happiness.

Relevant legislative findings are also found in 1975 Haw.Sess. Laws Act 184 § 1, Act 185 § 1, and Act 186 § 1 as follows:

ACT 184 FINDINGS AND PURPOSE

The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

(a) The fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners.

Note 21—Continued

The state and federal governments and the largest 72 private landowners own approximately 95 per cent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 per cent of all land.

(b) The small number of landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long-term residential leases. While fee simple ownership still accounted for 68.9 per cent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 per cent of all owner-occupied housing units developed on Oahu had been on leasehold. Between 1967 and 1972, 46 per cent of such development has been on leaseholds. In 1973, leaseholds constituted 32 per cent of all owner-occupied housing, more than double the percentage in 1960.

(c) The foregoing developments have compelled thousands of people in the State to resort to leaseholds to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

(d) Residential leaseholds have had and continue to have the following undesirable economic effects:

- (1) The scarcity of fee simple residential lands have [sic] pushed the price of fee simple residential units to high levels;

- (2) The high levels of fee simple residential unit prices have artificially raised the level of prices for leasehold units;

- (3) The high prices commanded for leasehold units have encouraged the development of leasehold residential units and discouraged the development of fee simple units;

- (4) The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) ranging from 400 per cent to 1000 per cent, for renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residence are situated, and these new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages;

- (5) Rental renegotiations have strongly favored the lessor, the lessee having little option but to consent to such rental

Note 21—Continued

as determined by the lessor or to give up the leasehold and home, although the lease may yet have 25 or more years to run; and

(6) The inequality of bargaining power has allowed lessors to charge lease rent based not only on the raw land value of the property but also on the value of the offsite and onsite improvements which have already been paid for or will be paid for by the lessee and on the value accruing thereon;

(7) The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g., a house appraised at \$68,000 before renegotiation of lease rental was increased) [sic], causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

(e) Residential leaseholds have also undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase another home. These situations aggravated the already acute need for government-sponsored low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future, and will adversely affect the health and welfare of these people and the general welfare of the people of the State of Hawaii.

The legislature further finds and declares:

(1) That the land in Hawaii is to be considered as a source of life, dignity, and economic freedom for the men and women who reside on it;

(2) That it is the policy of the State that each person shall have the right of ownership of the land on which he makes his home;

(3) That it is also the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms;

Note 21—Continued

(4) That the public health, safety, and welfare of the people of Hawaii demand that Act 307, Session Laws of Hawaii 1967, be fully implemented and that other applicable laws be enacted including legislation to prevent the imposition of confiscatory economic burdens upon the thousands of lessees presently living on leased property.

ACT 185 FINDINGS AND PURPOSES

The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

The home is the basic source of shelter and security in society, the center of our society which provides the basis for the development of our future citizens. Deprivation through exorbitant and unreasonable prices of this basic need results in frustrations and unrest in our community that is harmful to the overall fiber of our society.

Although Act 307 was enacted in 1967 the fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 percent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 percent of all land.

Along with this concentrated ownership of land there exists in the State of Hawaii a critical shortage of housing units for all income levels. There will be a need for over 250,000 low and middle income units by 1985 and a need will exist for all types of units. Since 1961 the economy has been producing an average of less than 10,000 low and middle income units annually. The economy has similarly lagged in the production of all other units, except the very high priced.

The small number of private landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long term residential leases. While fee simple ownership still accounted for 68.9 percent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 percent of all owner-occupied housing units developed on Oahu had been lease-

Note 21—Continued

hold. Between 1967-1972, 46 percent of such development has been on leaseholds.

The foregoing developments have compelled thousands of people in the State to resort to leasehold residences to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

The predictions of Act 307 as to effects of the residential leasehold system have proven to be conservative. Today, there are over 26,000 outstanding residential leases, an increase of more than 10,000, since Act 307 was enacted. As stated in Act 307, the concentration of land ownership "is in the rapidly developing urban areas of the State, where the need for single family residential lots is critical".

Initially, lease rents were low or were within the range which the public could afford. However, in the renegotiation of rents that have occurred in recent years, tremendous increases in lease rents have been imposed upon countless lessees by lessors. The compensation provided to be paid to lessors under Act 307 was directly related to the present value of the lease income stream generated under the lease to be condemned. Since June 24, 1967 lessors have generally adopted a practice of increasing lease rentals on renegotiations of existing leases in a manner unrelated to the raw land value, thereby greatly increasing the cost to the lessee when exercising his rights under Act 307 and resulting further in unconscionably increasing lease rents.

Renegotiation has brought about staggering increases in annual lease rentals. These increases have been the direct result of inflated land values which in turn have come about because of the supply of urban land for residential housing under the concentrated ownership described in the findings contained in Act 307. The effect of these increases has been to substantially increase the cost of leasing housing for the people of Hawaii. The increases in lease rentals and premiums required prior to leasing of residential property has accentuated the problem stated in section 1 (g) of Act 307 to the effect that the continuation of the residential leasehold system causes an artificial inflation in the price of fee simple residential property, as well as leasehold residential property.

Further, because of the unequal bargaining power between large landowners and individual lessees there have been breakdowns in the normal processes of bargaining and freedom of contract, resulting in unjust, unreasonable and oppressive lease rents being exacted by lessors. Thus the limited supply of housing units and concen-

Note 21—Continued

trated ownership of such units have led to the exaction of exorbitant lease rents on renegotiation. In many instances, the lessor's terms are peremptorily submitted to the lessee in ultimatum form through letters rather than through any actual bargaining process.

This unequal bargaining relationship exists today despite the rights granted lessees under Part III of Act 307 which was passed some seven years ago. Accordingly the adverse and harmful effects sought to be alleviated by that Act have not been stemmed, but to the contrary have become more critical.

In addition to inequality of bargaining power due to the oligopolistic imbalance in land ownership has allowed the lessor to charge lease rents based not only on the raw land value of the property but also on improvements which have already been paid for by the lessee and on the value accruing thereon; thus the lessee is, in effect, paying the lessor for an investment made by the lessee. This is an unjust enrichment created by an oligopolistic market lacking competitive bargaining and is contrary to the public welfare.

Inasmuch as the free market cannot correct this situation because of the lack of competition, inherent in an oligopolistic market, it is necessary for the public good and welfare that the imbalance be redressed.

Residential leaseholds have had and continue to have undesirable economic effects. The high prices commanded for leasehold units have encouraged the development of leasehold residential units and have discouraged the development of fee simple units. The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) as much as 1000 percent; renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated. These new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages. Rental renegotiations have strongly favored the lessor, with the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold, although the lease may yet have 25 or more years to run. The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g. a house appraised at \$68,000 before renegotiation of lease rent has been appraised at \$59,000 after the lease rental was increased), causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

Note 21—Continued

Residential leaseholds have had undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase other housing. These situations have grave effects on the health, welfare and well-being of elderly persons and aggravate the already acute need for government-sponsored, low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future.

The legislature declares that it is the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms; that the public health, safety and welfare of the people of Hawaii demand that legislation be enacted to prevent the imposition of confiscatory economic burdens upon the lessees of residential property; that pursuant to and based upon the findings stated above, the public health, safety, and welfare is severely and substantially affected and threatened, resulting in immediate, continuous, and irreparable harm and that all the conditions and circumstances set forth herein constitute a social emergency which it is the purpose of this act to prevent and remedy.

ACT 186 FINDINGS AND PURPOSE

Act 307, Session Laws of Hawaii 1967, now Chapter 516, Hawaii Revised Statutes, was intended to lessen the adverse consequences of the excessive concentration of the fee title to lands in Hawaii in the hands of a few owners by allowing residential leaseholders to acquire the fee simple title absolute or otherwise, to real property they were leasing.

The legislature finds that although the Act has been in full effect for nearly six years it has not been implemented. Many reasons have been cited for the failure to put the Act into effect including possible legal or constitutional difficulties inherent in the original Act.

The purpose of this Act is to reaffirm and reiterate the findings and declarations of necessity originally set forth in Act 307 and to amplify and clarify those findings and declarations of necessity.

cess of law is the same as the prohibition of the Fifth Amendment against the taking of private property for public use without just compensation,²² under either Amendment "public use" includes "public interest."²³

Second, I am of the opinion that the statutory definition of "owner's basis"²⁴ raises serious constitutional questions.

²²See *Chicago Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 233-41, 17 S.Ct. 581, 41 L.Ed. 979 (1897); *Rodgers v. Tolson*, 582 F.2d 315, 318 (4th Cir. 1978); *Gordon v. City of Warren*, 579 F.2d 386, 389-90 (6th Cir. 1978); *O'Grady v. City of Montpelier*, 573 F.2d 747, 750 n. 8 (2d Cir. 1978).

²³See *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949); *Nichols, The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. Rev. 615 (1940); *New York City Housing Authority v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936); *Dornan v. Philadelphia Housing Authority*, 331 Pa. 209, 200 A. 834 (1938). See also cases cited in note 18, *supra*.

²⁴Haw.Rev.Stat. § 516-1(14) (1976). The definition reads as follows:

"Owner's basis" means the current fair market value of the lot. The fair market value shall be established to provide the lessor with just compensation for his interests in the lot and shall take compensation for his interests in the lot and shall take into consideration every interest and equity of the lessee in establishing that market value. The value shall be determined by whichever following method provides just compensation and gives the greater consideration to the lessee's interest:

(A) The sum of: (i) the future rental stream for the lot for the term of the lease discounted to present worth from the expiration date of the lease; and (ii) the value of the lessor's reversionary interest in the lot discounted to present worth from the expiration date of the lease. The discount rate shall be based on the maximum rate of return for insured passbook demand saving account paid by the savings and loan institutions in Hawaii plus three and three-fourths per cent; provided, however, that the discount rate may be modified by mutual agreement of the lessor, lessee, and the authority; or

The first two sentences of Haw.Rev.Stat. 516-1(14) are not objectionable.²⁵ Thereafter, the definition attempts to qual-

(B) The current fair market value of the lot, valued as if it were a fee simple lot and as if the fee title were unencumbered, and excluding onsite improvements, established by a market data approach utilizing comparable sales, less the following:

(i) The value of the lease, including any rights therein, if any, which accrues to the lessee;

(ii) That percentage of the general enhancement of the neighborhood which has been paid for or contributed directly or indirectly by the lessee;

(iii) The current replacement cost of that portion of existing offsite improvements, including overhead and profit at prevailing rates, which were paid for or otherwise contributed directly or indirectly by the lessee;


(iv) That percentage of the general enhancement of the development tract and the lot caused by the onsite improvements on the lot paid for, or contributed, directly or indirectly, by the lessee;

(v) That amount, not otherwise deducted herein, allocated to the lot, which was paid for or otherwise contributed, directly or indirectly by the original lessee, computed at prevailing rates for overhead and profit in developing the development tract established by existing practice in the community; and

(vi) That amount for fees and costs which would ordinarily be borne by lessor in transferring such interest to lessee, including, but not limited to, attorneys' or realtors' commissions, other costs of sales, and similar fees;

provided, however, that the values established by any one of the foregoing shall not be duplicated in any one of the other provisions.

²⁵These two sentences equate fair market value of the leased fee interest with just compensation to the lessor. This accords with



ify "fair market value" and "just compensation" by setting forth two and only two methods by which just compensation "shall" be determined, and by mandating that method which "gives the greater consideration to the lessee's interest."²⁶ Without going into the details of Method A²⁷ and Method B,²⁸ it is clear to me that the definition can pass

accepted Constitutional requirements. *Backus v. Fort Street Union Depot Co.*, 169 U.S. 557, 573, 575, 18 S.Ct. 445, 42 L.Ed. 853 (1898); *United States v. Miller*, 317 U.S. 369, 373-74, 63 S.Ct. 276, 87 L.Ed 336 (1943).

²⁶Intervenors argue that the controlling phrase is "just compensation" and the rest of the definition must be read in that light. Thus if method "(A)" results in "just compensation" and method "(B)" does not, but method "(B)" gives "the greater consideration to the lessee's interest," method "(B)" is not to be used. Actually, the definition is logically incomplete as it does not provide for the circumstance wherein "just compensation" and "the greater consideration to the lessee's interest" do not both result from applying the same method. Beyond that, the definition semantically inconsistent in that the use of a method that gives the lessee's interest greater consideration implies that that method gives the lessor's interest lesser consideration, which leaves the meaning of "just compensation" understandable only in terms of a dialect of newspeak.

²⁷Haw.Rev.Stat. § 516-1(14)(A) (1976), *supra* note 24. The method described is agreed by all testifying experts to be one acceptable method of determining fair market value of a leased fee interest, except that the discount rate should be determined by market conditions and not fixed by statute. The testimony was to the effect that application of the statutory formula resulted in a discount rate the same as or somewhat more favorable to the lessor than the discount rate in the market. While the method appears to be straight forward and definite, intervenors' experts testified that there were some six judgment calls that had to be made by an appraiser in using this method.

²⁸Haw.Rev.Stat. § 516-1(14)(B) (1976), *supra* note 24. Again all experts agreed that the general approach is one acceptable method of determining the fair market value of a leased fee interest. Plaintiffs' experts testified, however, that if followed literally,

constitutional scrutiny under the Fourteenth Amendment only if everything after the first two sentences in this definition of "owner's basis" is ignored. That, in essence, is what I understand defendants and intervenors to argue that I should do.²⁹

Third, I am of the opinion that the mandatory arbitration provisions of Part IIA³⁰ are unconstitutional on their face.³¹ The statute provides that mandatory arbitration shall be in advance of and not any part of any action in eminent domain,³² that mandatory arbitration shall be conducted and carried into effect before a condemnation action

the method as defined could not result in "just compensation." Intervenors' experts testified that the method was presently rather unless because of the paucity of market data, and that the itemization of what to deduct was considered to be more of a checklist than a required list of items to be valued. Intervenors' appraisers considered items (ii), (iii), (iv), and (v) to be included under item (i), and all experts had difficulty accommodating item (vi).

²⁹One difficulty with the detailed and restrictive approach of § 516-1(14) is that it purports to exclude any method other than method "(A)" and method "(B)" as therein defined. But intervenors' experts testified that they did not consider themselves to be so restricted by the statutory language. Neither expert, in applying the statute, actually compared the results obtained by applying method "(A)" with the results obtained by applying method "(B)" to determine which method gave "the greater consideration to the lessee's interest," and both, in applying method "(A)" built in an inflation factor which offset the mandatory discount rate. In effect, they decided what in their opinion present fair market value of the leased fee interest in a lot amounted to, and then adjusted the several judgment calls involved to justify this opinion.

³⁰Haw.Rev.Stat. ch. 516 Part IIA (1976).

³¹It is assumed, for purposes of this hearing, that we are only considering the application of these provisions to leases executed prior to June 15, 1976, the date this part took effect.

³²Haw.Rev.Stat. § 516-51(b) provides:

This mandatory arbitration shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

has been commenced,³³ and that the purpose of the mandatory arbitration is "to establish [the] amount of just compensation which will be paid to lessor for the lessor's leased fee interest" in the event of condemnation.³⁴ All defendants agree that the lessor eventually is accorded a right to a jury trial on the issue of just compensation,³⁵

³³Haw.Rev.Stat. § 516-53 (1976) provides:

Timing of mandatory arbitration. Mandatory arbitration under this part shall be conducted and carried into effect before a condemnation action has been commenced.

³⁴Haw.Rev.Stat. § 516-51(a) (1976) provides:

Mandatory arbitration of compensation authorized. (a) Upon the filing of a petition by the number of lessees required by section 516-22 with the Hawaii housing authority, the authority shall request the lessor and the lessees or their designated agents to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development tract. If negotiations fail then the Hawaii housing authority shall direct the lessor and lessee to submit to mandatory arbitration under chapter 658 to establish an amount of just compensation which will be paid to lessor for the lessor's leased fee interest under section 516-24.

³⁵Haw.Rev.Stat. § 516-23 (1976) provides in part that "the authority shall exercise its power of eminent domain in the same manner as provided in chapter 101." Haw.Rev.Stat. ch. 101 (1976) contains Hawaii's general statutory provisions relating to eminent domain. § 101-11 provides that "the procedure shall be the same as in other civil actions." This includes the right to a jury trial on the issue of compensation of damages. See *State v. Chang*, 50 Haw. 195, 436 P.2d 3 (1967).

This is not to say that a State may not employ other procedures for determining just compensation. See *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 236, 17 S.Ct. 581, 41 L.Ed. 979 (1897); 12 WRIGHT AND MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3055 (1973). Here, mandatory arbitration is specifically stated *not* to be any part of any action in eminent domain. See notes 32 and 33, *supra*.

that just compensation is equivalent to fair market value,"³⁶ and that fair market value is to be determined by the jury based on all relevant evidence."³⁷

The statute provides that the "effect of the arbitration award and all matters relating thereto shall be prima facie evidence as to just compensation in any condemnation proceeding under this chapter."³⁸ But the mandatory arbitration is to proceed pursuant to Haw.Rev.Stat. Chap. 658,³⁹ which provides for proceedings in a circuit court confirming, vacating, modifying, or correcting an award, and a further appeal to the State supreme court.⁴⁰ By the time these procedures have been completed, considerable time will have elapsed.⁴¹ Yet the date of valuation in condemnation is the date of designation by the Hawaii Housing Authority,⁴² which has no necessary relationship to the date as of which "just compensation" is determined pursuant to the mandatory arbitration, and would be expected to come after the final completion of the mandatory

³⁶See cases cited in note 25 *supra*.

³⁷See *United States v. Miller*, 317 U.S. 369, 373-75, 63 S.Ct. 276, 87 L.Ed 336 (1943).

³⁸Haw.Rev.Stat. § 516-55 (1976).

³⁹Haw.Rev.Stat. § 516-51(a) and § 516-54(a)(6) (1976).

⁴⁰Haw.Rev.Stat. § 516-54(a)(6) (appeal to circuit court), § 658-8 (award; confirming award), § 658-9 (vacating award), § 658-10 (modifying or correcting award), § 658-15 (appeal when) (1976).

⁴¹"The Supreme Court of Hawaii is falling alarmingly behind in disposing of its expanding caseload. The current backlog is sufficient, given existing disposition rates, to occupy the Court for three years." Levinson, *Appellate Caseload in Hawaii*, 13 HAW. BAR J. (No. 3) 3 (1977).

⁴²Haw.Rev.Stat. § 516-24 provides that the compensation to be paid for the lessor's leased fee interest "shall be determined as of the date of the designation of the applicable portion of the development tract for acquisition."

arbitration proceedings and a further refusal by the lessor to convey."³

And then when the final judgment has been entered determining the arbitration award, the lessee does not have to purchase the lessor's leased fee interest,⁴ and the Hawaii Housing Authority does not have to commence condemnation proceedings.⁵ Nevertheless, and even if there is a purchase or a condemnation, the lessor must pay one-half of all expenses and fees of arbitration proceedings incurred by the arbitrators,⁶ without reimbursement.⁷

³The mandatory arbitration provisions of the chapter do not specify the date as of which "just compensation" shall be determined. Presumably the arbitrators will specify the date they have used in reaching their award. § 516-51(a) does provide that the purpose of the mandatory arbitration is "to establish an amount of just compensation which will be paid to lessor for the lessor's leased fee interest" under § 516-24. But for the latter purpose, by § 516-24, just compensation is to be determined as of the date of designation, which by § 516-53 is supposed to come after the completion of arbitration. Since the arbitrators can hardly be expected to guess when the Hawaii Housing Authority will designate a development tract for acquisition, the date of valuation for purposes of mandatory arbitration and the date of valuation for purposes of condemnation will necessarily be different, by possibly several years.

⁴The only effect of the arbitration award is that it "shall be prima facie evidence as to just compensation in any condemnation proceeding under this chapter." Haw.Rev.Stat. § 516-55 (1976).

⁵Haw.Rev.Stat. § 516-51(b) (1976).

⁶Haw.Rev.Stat. § 516-54(a)(5) (1976) provides:

All expenses and fees of arbitration proceedings incurred by arbitrators shall be paid one-half by lessors and one-half by lessees.

⁷Haw.Rev.Stat. § 516-23 (1976) provides in part that, after a designation pursuant to § 516-22:

If the development tract or applicable portion thereof, as the case may be, is not acquired or eminent domain proceedings

This in itself may be a taking of property without just compensation.⁴⁸

Having reached the conclusions set forth above, I must still decide whether a preliminary injunction should issue and if so what should be enjoined. The statute in question contains a very comprehensive severability clause.⁴⁹ Thus, unless the statute must stand or fall as a whole, specific provisions that may be invalid may be separated out, leaving the other provisions in force.

I am of the opinion that those portions of the definition of the "owner's basis" to which the Trustees object are severable. I frankly do not believe that striking everything after the first two sentences in Haw.Rev.Stat. 516-1(14) would have any effect whatsoever on the operation of the statute or on the manner in which appraisers value the lessor's leased fee interest.⁵⁰ In any event, there is no pending matter involving these objected-to provisions that requires a preliminary injunction.

I am of the opinion that the mandatory arbitration provisions of the statute likewise are severable. In fact, the

are not instituted within the twelve-month period [after designation], the authority shall reimburse the fee owner, the lessor and the legal and equitable owners of the land so designated for actual out-of-pocket expenses of appraisal, survey, and attorney fees as the owner, the lessor, and the legal and equitable owners may have incurred as a result of the designation.

There is no similar provision with respect to the expenses incurred as a result of the mandatory arbitration proceedings of Part IIA.

⁴⁸See 12 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 3056 (1973); *Supplementary Report of the Advisory Committee on Rule Governing Condemnation Cases*, 11 F.R.D. 222, 243 (1951).

⁴⁹Haw.Rev.Stat. § 516-82 (1976). Although the statutory provision came from 1975 Haw.Sess.Laws Act 184 § 2, similar severability provisions were contained in 1967 Haw.Sess.Laws Act 307 § 44, and in 1976 Haw.Sess.Laws Act 242 § 6.

⁵⁰See discussion in notes 26, 27, 28, and 29, *supra*. None of this language was in the original Hawaii Land Reform Act. See legislative history set out in note 13, *supra*.

statute as originally passed did not contain this part, which was added in 1976.⁵¹ Unlike the objectionable features of the "owner's basis" definition, however, the Trustees are presently faced with a demand by the Hawaii Housing Authority to enter into mandatory arbitration pursuant to the statute.⁵² As I have indicated that in my opinion the Trustees will probably succeed on the merits of this issue, I must determine whether there is possible irreparable injury to the Bishop Estate or a balance of hardships tipping decidedly toward the Trustees so as to make just and proper the issuance of a preliminary injunction enjoining the implementation of Part IIA of Chapter 516 of the Hawaii Revised Statutes.

A preliminary injunction limited to mandatory arbitration affects only one pending group of lessees of 102

⁵¹See discussion in note 15, *supra*.

⁵²Letter dated January 22, 1979, from the Acting Executive Director of the Hawaii Housing Authority to the Trustees of the Bishop Estate informing the Trustees that the Commission of the Authority on January 18, 1979, had by a unanimous vote decided to invoke mandatory arbitration in connection with the leasehold to fee simple conversion of lots in Tract H as requested by the Wai-Kahala Tract H Association, Inc., and pursuant to the Authority's Rule 10, Section 10. The latter concluded with the directive that "the parties are ordered to begin mandatory arbitration upon receipt of this notice."

An earlier letter dated August 21, 1978, from the Land Reform Administrator to the Trustees notified the Trustees that Tract H petitioners had "asked to proceed to arbitration" and stated that "it is appropriate that the arbitration period required by that section [1976 Haw.Sess.Laws Act 242 § 4] commence." This letter advised the Trustees that "you have 30 days from the date of receipt of this letter to name an arbitrator; the petitioners are also naming an arbitrator." The Trustees refused to name an arbitrator. Among other grounds, they did not consider this letter as having been properly authorized.

lots.⁵³ It is not likely that many other lessees would be similarly affected for several months. Even those prevented by a preliminary injunction from starting the mandatory arbitration procedures may seek a designation pursuant to Haw.Rev.Stat. § 516-22 which would have the effect of fixing the date of valuation.⁵⁴

On the other hand, the Trustees would be forced into a proceeding which could set a precedent affecting several thousand lots⁵⁵ and which could make them liable for an indeterminate amount in unrecoverable costs.⁵⁶

As I balance the relative interests of the parties and of the public, I am of the opinion that the *Aguirre* test for the issuance of a preliminary injunction has been met.

The preliminary injunction shall be in the same form as the Temporary Restraining Order as modified on March

⁵³The only group of Bishop Estate lessees who have progressed to the point where the Hawaii Housing Authority may direct the lessor and lessees to submit to mandatory arbitration are those in so-called Tract H represented by WAIKAHALA TRACT H ASSOCIATION, INC. Tract H comprises 102 lots.

⁵⁴Haw.Rev.Stat. § 516-22 and § 516-24 (1976). While Part IIA provides that mandatory arbitration shall precede condemnation, there is no requirement that mandatory arbitration shall precede designation.

⁵⁵While Tract H of 102 lots is the only Bishop Estate development tract which is presently at the stage when mandatory arbitration may be ordered, several other Bishop Estate tracts involving about 7,000 lots are going through the procedures established by the Hawaii Land Reform Act for leasehold to fee simple conversion.

⁵⁶From 1918 through March 1977, the Bishop Estate executed some 20,735 residential leases in development tracts. At present there are in force some 13,500 such leaseholds involving approximately 3,500 acres of land. 6,280 leases of lots in residential development tracts were executed from 1967 to 1977, inclusive.

27, 1979,⁵⁷ with the further proviso that steps outside of Part IIA, specifically designation and commencement of condemnation proceedings, are not enjoined under this preliminary injunction.⁵⁸

Intervenors suggest security in the amount of \$1,000,000 to cover possible damages to lessees for a wrongful injunction. The Trustees suggested and posted security in the amount of \$100 on the temporary restraining order. In my opinion, each lessee is adequately secured against inflationary or real increases in value by the lessor's leasehold fee interests in the lot leased by the lessee. This is not to imply that the lessees might have any claim. The injunction actually runs only against the Hawaii Housing Authority. I do believe, however, that a more substantial sum than \$100 is called for, notwithstanding the financial resources of the Bishop Estate. Under the circumstances I believe security in the sum of \$10,000 would be proper.

Counsel for the respective parties and intervenors shall attempt to agree upon a form of preliminary injunction for submission to the court on or before May 15, 1979, or in default of agreement, shall submit their respective suggestions on the same date.

The foregoing constitute the court's findings and reasons required by Rule 65(d) of the Federal Rules of Civil Procedure.

⁵⁷Restraining only steps under Part IIA following a letter from the Hawaii Housing Authority directing the lessor and the lessee(s) to submit to mandatory arbitration.

⁵⁸Plaintiffs cannot be seriously damaged in the next several months as actual condemnation is not that imminent. In this area, a balancing of the interests of the parties and of the public leads me to the conclusion that a preliminary injunction should not issue, even if plaintiffs might ultimately prevail on their claim that the State's power of eminent domain may not be used to accomplish the purposes of the Hawaiian Land Reform Act.

Appendix D

ACT 307

S. B. 1128.

A Bill for an Act Relating to Residential Leaseholds, the Acquisition by the State Through Condemnation of Lands in Fee Simple and the Disposition Thereof, and the Rights of Lessees.

Be It Enacted by the Legislature of the State of Hawaii:

PART I

GENERAL PROVISIONS

Section 1. Findings and declaration of necessity. The legislature finds that:

(a) A prime goal in the United States is the promotion of the public welfare and the securing of liberty as enunciated in the Constitution of the United States through the attainment of fee simple ownership of residential lots by the greatest number of people. Article I, section 2 of the State Constitution recognizes this goal when it states:

“All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property”

(b) During the past few years, Hawaii's economy has expanded greatly and its population has grown rapidly. Concomitantly, the demand for single-family residential lots, especially in the urban areas of the State where the population growth has been concentrated, has increased sharply.

(c) The present-day land ownership system in the State is characterized by a concentration of the fee title to lands in the hands of a few. In the days of the Hawaiian monarchy, all of the lands were held by the Hawaiian kings and

chiefs and a few of their faithful followers. While the concentration of ownership of land in the hands of a few may have been well-suited to the needs of the people in the days of the monarchy, it is hardly suited to the needs of the people in modern Hawaii. Yet, the pattern of concentration of land ownership in the hands of a few has remained essentially unchanged since the days of the monarchy. Today, land ownership is centered not in the monarchical government, but in the hands of a few estates, trusts and other private landowners. At least three-fourths of all privately held land in the State are currently owned by this small group of owners. Much of this land is in the rapidly developing urban areas of the State, where the need for single-family residential lots is critical.

(d) This critical shortage of land has led large landowners to enter into complex arrangements, such as development contracts, master leases, participating leases, subleases and leases with developers. The terms and conditions of these arrangements were at that time heavily weighted in favor of the lessors or fee owners against the developers and those who participated in the development or share in the lease rentals. Neither did the participants in the private arrangements or contracts or leases contemplate, at that time, the wholesale condemnation of private leased residential lots by the State as provided in this act.

(e) The few landowners have, over the years, permitted some of their urban lands to be developed into single-family residential lots. However, because of restrictive indentures in instruments creating the various trusts and estates, and because of income taxation problems, the landowners have generally engaged in the practice of leasing, rather than selling in fee simple, the residential lots developed on their lands.

(f) The population growth and the increase in demand for residential lots, and the concentration of ownership of

private lands in the hands of a few and their practice of leasing, rather than selling in fee simple, the residential lots developed on their lands, have led to a serious shortage of residential fee simple property at reasonable prices in the State's urban areas and have deprived the people of the State of a choice to own or to take leases to the land on which their homes are situated.

(g) The shortage of single-family, residential, fee simple property, and the restriction on the people of a real choice between fee simple and leasehold residential property have in turn caused land prices for both fee simple and leasehold residential lots to become artificially inflated and have enabled lessors to include in residential leases terms and conditions that are financially disadvantageous to the lessees, restrict unduly their freedom to enjoy their leasehold estates and are weighted heavily in favor of the landlord as against the lessees.

(h) In the next twenty years, it appears that the few, large landowners will continue to permit the development of leasehold, rather than fee simple, residential lots in counties exceeding 100,000 persons in population, unless legislation is enacted to reverse this trend.

(i) Even when the provisions providing for purchase of the fee simple title of residential lots by lessees or the State as provided in this act become effective, neither the lessees nor the State can possibly acquire all leasehold lands. Thus, many of the over 16,000 leasehold contracts now in existence and future leases will remain outstanding, and the economic facts stated above indicate clearly that lessees require certain statutory protection of their fundamental rights to bargain and to otherwise preserve their equitable and legal interests.

(j) The dispersion of ownership of fee simple residential lots to as large a number of people as possible, the

ability of the people to acquire fee simple ownership of residential lots at a fair and reasonable price and the ability of lessees of residential leases to derive full enjoyment from their leaseholds are factors which vitally affect the economy of the State and the public interest, health, welfare, security and happiness.

The legislature declares as a matter of legislative determination that:

Section 2. Definitions. Unless otherwise clear from the context, as used in this Act:

(a) "Lease" means a conveyance of land by a fee simple owner as lessor, or by a lessee as sublessor, to any person, in consideration of a return of rent or other recompense, for a term (1) exceeding thirty-five years (including any periods for which the lease may be extended or renewed at the option of the lessee) as to leases existing and in force on the date of approval of this Act, or (2) exceeding twenty years (including any periods for which the lease may be extended or renewed at the option of the lessee) as to leases executed after the date of approval of this Act.

(b) "Lessor" means any person who leases or subleases land to another, and his heirs, successors, legal representatives and assigns.

(c) "Lessee" means any person to whom land is leased or subleased, and his heirs, successors, legal representatives and permitted assigns.

(d) "Fee simple owner" and "fee owner" mean the person who owns the fee simple title to the land which is leased, including a life tenant with a remainder over, vested or contingent and a holder of a defeasible estate, and his heirs, successors, legal representatives and assigns.

(e) "Legal and equitable owners" means the fee simple owner and all persons having legal or equitable interests in

the fee or in the lessor's leasehold estate, including mortgagees, developers, lienors and sublessors, and their respective heirs, successors, legal representatives and assigns.

(f) The terms "lessor", "lessee," "fee simple owner", "fee owner", and "legal and equitable owners" include individuals, both masculine and feminine, and, except as to the term "lessee", the terms also include corporations, firms, associations, trusts, estates, and the State. When more than one person are the lessors, lessees, fee simple owners, fee owners, or legal and equitable owners of a lot, the terms apply to each of them, jointly and severally.

(g) "Leased fee" and "leased fee interest" mean all of the interests of the fee owner, lessor and all legal and equitable owners of the land which is leased, other than the lessee's interest as hereinafter defined.

(h) "Lessee's interest" and "leasehold interest" mean the current fair market value of all on-site improvements, including all landscaping, walks, drives, walls, fences, buildings and betterments on the surface of the lot, paid for or required to be paid for by the lessee, plus the unamortized current replacement cost of all off-site improvements paid for or required to be paid for by the lessee, determined on the basis of current costs of installation of the same off-site improvements under the circumstances existing at the time of the original installation, and computed on a straight-line basis over the period of the lease, together with the lessee's value increment as hereinafter defined.

(i) "Lessee's value increment" means the value of his interest in the residential use, enjoyment and amenities of the lot during the balance of the unexpired term of the lease, computed notwithstanding any provision to the contrary in the lease or any other contract; provided that such value shall in no event be less than ten per cent nor more than 15 per cent of the current fair market value of the unencumbered fee of the lot.

(j) "Lot", "housetot", "residential lot", and "residential houselot" mean a parcel of land, one acre or less in size, which is used or occupied, or is developed, devoted, intended or permitted to be used or occupied as a principal place of residence for a single family.

(k) "Fair market value" means that amount of money that a purchaser willing, but not obliged, to buy an interest in land would pay to an owner willing, but not obliged, to sell it, taking into consideration all uses to which the land is adapted or might in reason be applied.

(l) "Development tract" means a single contiguous area of real property not less than five acres in size which has been developed and subdivided into residential lots occupied or to be occupied under leases. Two or more pieces of real property shall be considered as a single contiguous area if they would be contiguous except for the interposition or existence of a road, street, stream, or other like interference.

(m) "Authority" means the Hawaii housing authority created by chapter 74, Revised Laws of Hawaii 1955.

Section 3. Applicability. The provisions of this act apply to all lands leased as residential lots which are situated in counties with a population of 100,000 or more, owned or held privately or by the State, except Hawaiian home lands which are subject to Article XI of the Constitution of the State and lands owned or held by the federal government.

Section 4. No estoppel or waiver. The rights granted to lessees by this act shall be effective, notwithstanding any provision in any lease or contract to the contrary. No lessee shall be estopped by any covenant, term, condition, or contract, however worded, from claiming the rights granted to him or otherwise be deemed to have waived

such right. Any provision in any lease or contract contrary to the intent or purpose of this act shall be void.

Section 5. Trusts and estates. The rights granted to lessees by this chapter shall be effective, notwithstanding any condition or provision to the contrary in any instrument creating any life tenancy, defeasible fee, estate or trust, regardless of whether such tenancy, fee, estate or trust was in effect prior to the effective date of this act or is created hereafter; and the life tenant, holder, officer or trustee of any such tenancy, defeasible fee, estate, or trust may convey residential leases for terms exceeding twenty years and shall perform all acts required of him by this act. Every such instrument now in existence or hereafter executed shall be construed in conformity with the intent and purpose of this act.

Section 6. Penalty. [omitted]

Section 7. Administration of act. The Hawaiian housing authority shall administer this act.

Section 8. Authority's duties, generally. In addition to any other duty prescribed by law and in this act, the authority shall:

• • •

(g) Acquire by eminent domain proceedings, all necessary property interests as provided in this act.

(h) Make and execute contracts, mortgages, and other instruments necessary or convenient to the exercise of the powers of the authority.

(i) Issue revenue bonds and refunding bonds as provided in this act.

• • •

Section 9. [omitted]

PART II

CONDEMNATION OF DEVELOPMENT TRACT

Section 10. Applicability. This part applies to development tracts which are, at the time of acquisition of the tracts by the authority as provided herein: (a) developed and subdivided into residential houselots occupied by lessees under leases executed before the date of approval of this act; (b) developed and subdivided or partially developed into residential houselots occupied or to be occupied by lessees under leases executed after the date of approval of this act, provided that ten or more years remain before the final termination of the lease term, and provided further that 90 per cent of the leases to the lots have been executed.

Section 11. Designation of development tract for acquisition. The authority may designate a development tract for acquisition through exercise of the power of eminent domain or by purchase under threat of eminent domain if, after due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the county in which the development tract is situated on at least three different days, the last publication being not less than five days before the date of hearing, the authority finds that the acquisition of the tract through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof, as provided in this part will effectuate the public purposes described in this act and shall also find either

(a) that a shortage of fee simple residential property exists in the county and that the acquisition and disposition of the development tract by the authority as provided in this part will assist in alleviating this shortage pursuant to the purposes of this act, or

(b) that the lessees of more than 50 per cent of the residential lease lots within the development tract are

desirous of owning the leased fee interest to their lots and have the financial capabilities to pay for the same in the manner provided in this part.

The findings of the authority shall be conclusive in any suit, action or proceedings.

Section 12. Exercise of power of eminent domain. Within twelve months after the designation of the development tract for acquisition, the authority shall acquire through voluntary action of the parties, or institute eminent domain proceedings to acquire the tract so designated; provided that negotiations for acquisition by voluntary transaction shall not be required before the institution of eminent domain proceedings. Except as otherwise provided in this part, the authority shall exercise its power of eminent domain in the same manner as provided in chapter 8, Revised Laws of Hawaii 1955. If the development tract is not acquired or eminent domain proceedings are not instituted within the twelve month period, the authority shall reimburse the fee owner, the lessor and the legal and equitable owners of the land so designated for actual out-of-pocket expenses of appraisal, survey and attorney fees as the owner, the lessor, and the legal and equitable owners may have incurred as a result of the designation.

Section 13. Compensation. The compensation to be paid for the development tract shall be the current fair market value of the tract diminished by the lessees' interests in the leased lots within the tract. Compensation shall be determined as of the date of the designation of the development tract for acquisition.

Section 14. Interest acquired. (a) Upon acquisition of a development tract as provided in this part, the property interest acquired by the authority is all of the right, title, and interest of the fee owner, and of the lessor and all legal and equitable owners, if any, in and to the development tract acquired; subject to existing leases of residential

houselots within the development tract, and to all covenants, conditions, easements, reservations and restrictions of record running with the land or contained in the agreement of sale, deed or other conveyance held by the fee owner, lessor and legal and equitable owners or permitted or suffered by lessees of existing residential houselot leases, which are not inconsistent with the intent of this part. The acquisition terminates all the right, title and interest of the fee owner, lessor and all legal and equitable owners, whether such interest be a remainder, vested or contingent, a reversion, or other beneficial interest in the property, present or prospective.

(b) If the leasehold is subject to any mortgage, lien or encumbrance suffered or permitted by the lessee, including, but not limited to, rights arising through divorce, marriage or assignment, the purchase of the leased fee by the lessee shall in no manner affect or impair such mortgage, lien or encumbrance or the security afforded thereby to the holder thereof, and the leasehold shall continue, notwithstanding the purchase of the leased fee by the lessee, for the purpose and to extent necessary to avoid any impairment of such leasehold security, unless the holder of such leasehold mortgage, lien or encumbrance shall in writing consent to the transfer thereof to the fee as herein provided. Upon such written consent by the holder thereof, each such mortgage, lien or encumbrance to which the leasehold is subject and to which such consent refers shall be transferred to and shall bind the fee acquired by the lessee, and shall thereafter continue in full force and effect as a mortgage, lien or encumbrance of the fee acquired by the lessee, in the same order and priority among such mortgages, liens and encumbrances so transferred to the fee as the same applied to and bound the lessee's immediate, previous leasehold interest.

Section 15. Interest in compensation paid by the authority. The fee owner, lessor, and all legal and equitable

owners shall share in the compensation paid by the authority as their respective interests shall appear. Notwithstanding any contrary provision in any contract or lease, a developer or other person entitled to share in the lease rentals shall share in such compensation paid by the authority to the extent of his interest as may be determined by agreement of those entitled to share in the compensation paid by the authority and in the absence of such agreement, the interest of a developer or other person entitled to share in the lease rentals shall equal his total share in the lease rentals for the remainder of the period during which he would have been entitled to share in the lease rentals, discounted to present day value.

Section 16. Compulsory or involuntary conversion. It is the intent of the legislature, within the meaning of section 1033 or section 1231 of the Internal Revenue Code or the applicable provisions of chapter 121, Revised Laws of Hawaii 1955, as well as all other statutes, rules, regulations, administrative orders and legal interpretations within the federal and state governments relating to taxation, that any conveyance of title to property by a fee owner to the authority under the provisions of this part shall constitute a compulsory or involuntary conversion (as a result of the exercise of the power of condemnation or the threat of imminence thereof), and that such fee owner shall not be deemed, by reason in whole or in part of any provision of this part or by reason of the execution by the fee owner of leases to the property and other properties subsequent to the date of approval of this act, to hold the property primarily for sale to customers in the ordinary course of trade or business.

Section 17. Disposition, generally. It shall be the policy of the authority to encourage the widespread fee simple ownership of residential lots situated within a development tract. Where necessary or desirable, the authority may lease the residential lots. Not more than one lot shall be

sold in fee simple or leased to a purchaser or lessee. A husband and his wife together, unless separated and living apart under a decree of separation issued by a court of competent jurisdiction, shall be entitled to only one lot. Except in case of a sale to the lessee of the leased fee interest to his leasehold residential lot, no sale in fee simple or lease shall be made unless the purchaser meets all of the qualifications enumerated in section 22.

Section 18. Notice of disposition. Except in case of a sale of the leased fee interest to the lessee of a residential lot under lease, no sale or lease of any residential lot shall be made by the authority unless he has published on at least two different days in a newspaper of general circulation in the county, a notice of its intent to sell or lease. The notice shall state, in general terms, the size, location and prices or lease rentals of the lots to be sold or leased, the terms of the sale or lease, and the last date on which applications will be received by the board, which date shall not be less than thirty days after the first publication of such notice. The notice shall also state the times and places at which more detailed information with respect to the sale or lease may be secured by interested persons.

Section 19. Option of lessee to purchase leased fee. The lessee of a residential lot within a development tract, whether he was a lessee at the time of the acquisition or became a lessee after the acquisition of the development tract, may purchase from the authority at any time during the term of his lease the leased fee interest to the lot; provided, that the lessee is not then in default in the performance of his obligations under the lease; and provided, further that the sales price shall be at the lowest possible price consistent with section 21 and the purpose of this act.

Section 20. Disposition by lease. The authority may lease any of the residential lots in a development tract at such lease rentals and upon such terms and conditions as

it may determine. Such leases shall be subject to all of the rights of lessees enumerated in part III of this act. The authority may, in its discretion, utilize any of the residential lots and rent out the same for periods of twenty years or less for the purposes set forth in Title 8, Revised Laws of Hawaii 1955, or for any other purpose, all upon such terms and conditions as the authority may determine.

Section 21. Not for profit.

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Section 22. Qualification for lease or purchase. Except in the case of a sale to the lessee of the leased fee interest to any residential lot under lease, no lease or sale of any residential house lot within a development tract shall be made to any person:

(a) Unless he is a citizen of the United States or a declarant alien who has resided in the State for a period of five years or more; is at least twenty years of age; is a bona fide resident of the State and has a bona fide intent to reside in the development tract if successful in purchasing or leasing the lot; and has sufficient financial capabilities to meet the sales price or lease rentals.

(b) Who owns in fee simple lands suitable for residential purposes within the county and in or reasonably near the place of business of such person or has or have pending before the authority an unrefused application to lease or purchase a lot in a development tract. A person shall be deemed to own lands herein if he, his spouse or both he and his spouse (unless separated and living apart under a decree of a court of competent jurisdiction) owns such lands.

The authority may require additional testimony or evidence under oath in connection with any application. The determination by the authority of any applicant's eligibility under this part shall be conclusive as to all persons there-

after dealing with the property; provided that the making of any false statement knowingly by applicants or other person in connection with any application shall constitute perjury and be punishable as such.

Section 23. Mortgages, agreements of sale, other instruments. (a) If the purchaser of a fee simple title or leased fee is unable to obtain sufficient funds at reasonable rates from private lenders, the authority may, by way of mortgage, agreement of sale or other instruments to secure the indebtedness, loan to the lessee up to ninety per cent of the purchase price.

(b) The purchaser of the fee simple title or leased fee shall pay not less than ten per cent of the price and execute with the authority an agreement of sale or mortgage or other instrument to secure the indebtedness under the terms of which the unpaid balance and the interest thereon, at a reasonable rate determined by the authority, shall be paid in monthly installments over such periods as the authority may determine. Every mortgage, agreement of sale, other instruments to secure the indebtedness or instrument of indebtedness may contain such other provisions as are usually found in such instruments and shall provide that the purchaser may prepay the whole or any part of the unpaid balance of the purchase price plus accrued interest at any time without prepayment penalty.

(c) If the purchaser defaults on the payment of any loan, the authority shall take all necessary action to collect the delinquent principal and interest on the loan and may take all actions allowed to holders of obligations, including the power to repossess, purchase, lease, rent, repair, renovate, modernize and sell the property foreclosed.

Section 24. Restrictions on sale and use of residential lots. (a) For a period of five years after the lease was initially issued by the authority for a residential lot, or after the purchase from the authority of the fee simple

title to a residential lot where the purchase was made other than as a result of the exercise by a lessee of his option to purchase the leased fee, the lessee or purchaser shall not assign the lease or sell the fee unless he has first notified the authority in writing of his intention to assign or sell. The notice shall specify the lessee's or purchaser's address and shall expressly offer to sell such property to the authority at a price which shall not exceed the sum of the original cost to the lessee or purchaser less depreciation at the rates used for real property tax purposes, of all buildings and improvements thereon.

(b) Within thirty days after the receipt of such notice the authority shall in writing notify the lessee or purchaser at the address so specified whether it elects to exercise its option. If the authority refuses, or fails within the thirty-day period to reply to the offer, the lessee or purchaser may assign the lease or sell the property in fee to any person, free from any price restrictions.

(c) The authority may lease, rent or resell any lot and improvements so purchased as any other lot held by it under this part.

(d) Any original lease, deed, agreement of sale, mortgage and other instruments of conveyance issued by the authority under this part shall expressly contain the restriction on sale and use of the residential lot as prescribed by this section.

Section 25. Bonds. From time to time, the authority may issue revenue bonds, and also refunding bonds for the purpose of paying or retiring bonds previously issued, in such amounts as it may deem advisable for the purpose of this part. The authority may issue such types of bonds as it may determine, including bonds on which the principal and interest are payable exclusively from the income and revenues of the development tract, the acquisition and development of which are financed with the proceeds of

such bonds or from the income and revenues of other development tracts, the acquisition and development of which are not financed with the proceeds from such bonds. Any such bonds may be additionally secured by a pledge of any other revenues received. Any provision of any law to the contrary notwithstanding, all bonds issued pursuant to this act shall be fully negotiable.

Neither the members of the authority nor any person executing the bonds shall be liable personally on the bonds by reason of the issuance thereof.

Section 26. State and political subdivisions not liable on bonds.

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Section 27. Form and sale of bonds.

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Section 28. Provisions of bonds.

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Section 29. Bonds as legal investments.

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Section 30. Exemption from taxation and assessments.

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Section 31. Investment of reserves.

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Section 32. Security for funds deposited.

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Section 33. Fee simple residential revolving fund.

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PART III
RIGHTS OF LESSEES

Section 34. Applicability. Except as otherwise expressly provided, this part applies to all leases existing and in force on the date of approval of this act and to all leases executed thereafter.

Notwithstanding any term, condition or provision in any lease to the contrary, the lessee of a residential lot shall have all of the rights enumerated in this part.

Section 35. Discrimination.

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Section 36. Free assignability.

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Section 37. Forfeiture.

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Section 38. Extension.

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Section 39. Lease rental.

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Section 40. Zoning changes.

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Section 41. Rights to self-organization; remedies.

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Section 42. Sale of fee by lessor. No fee owner of any residential lot under lease shall sell the leased fee interest to the lot to any third party unless he has first given a written thirty-day notice to the lessee and the authority of such intention.

Section 43. Reversion of improvements. At the termination of any lease, or at the expiration of the lease term, the lessee may remove all improvements on the lot which were constructed at the cost of, or otherwise paid for by the lessee, without compensating the lessor therefor.

PART IV
SEVERABILITY, JUDICIAL DECLARATION,
AND EFFECTIVE DATE

Section 44. Severability.

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Section 45. Judicial declaration on validity of act. Any time after the date of approval of this act, any interested person may petition the supreme court for a judicial declaration as to the validity of any provision of this act pursuant to chapter 227 or chapter 228, Revised Laws of Hawaii 1955.

Section 46. Effective date. Parts I, III and IV shall take effect upon approval of this act; part II shall take effect on July 1, 1969.

(Became law June 24, 1967, without Governor's signature pursuant to State Constitution, Art. III, § 17.)

Appendix E

ACT 184

S.B. NO. 1200

A Bill for an Act Relating to Residential Leaseholds.

Be It Enacted by the Legislature of the State of Hawaii:

Section 1. Findings and purpose. The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

(a) The fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 per cent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 per cent of all land.

(b) The small number of landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long-term residential leases. While fee simple ownership still accounted for 68.9 per cent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 per cent of all owner-occupied housing units developed on Oahu had been on leasehold. Between 1967 and 1972, 46 per cent of such development has been in leaseholds. In 1973, leaseholds constituted 32 per cent of all owner-occupied housing, more than double the percentage in 1960.

(c) The foregoing developments have compelled thousands of people in the State to resort to leaseholds to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

(d) Residential leaseholds have had and continue to have the following undesirable economic effects:

(1) The scarcity of fee simple residential lands have pushed the price of fee simple residential units to high levels;

(2) The high levels of fee simple residential unit prices have artificially raised the level of prices for leasehold units;

(3) The high prices commanded for leasehold units have encouraged the development of leasehold residential units and discouraged the development of fee simple units;

(4) The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) ranging from 400 per cent to 1000 per cent, for renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated, and these new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages;

(5) Rental renegotiations have strongly favored the lessor, the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold and home, although the lease may yet have 25 or more years to run; and

(6) The inequality of bargaining power has allowed lessors to charge lease rent based not only on the raw land value of the property but also on the value of the offsite and onsite improvements which have already been paid for or will be paid for by the lessee and on the value accruing thereon;

(7) The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent pe-

riod (e.g., a house appraised at \$68,000 before renegotiation of lease rental was increased), causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

(e) Residential leaseholds have also undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase another home. These situations aggravated the already acute need for government-sponsored low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future, and will adversely affect the health and welfare of these people and the general welfare of the people of the State of Hawaii.

The legislature further finds and declares:

(1) That the land in Hawaii is to be considered as a source of life, dignity, and economic freedom for the men and women who reside on it;

(2) That it is the policy of the State that each person shall have the right of ownership of the land on which he makes his home;

(3) That it is also the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms;

(4) That the public health, safety, and welfare of the people of Hawaii demand that Act 307, Session

Laws of Hawaii 1967, be fully implemented and that other applicable laws be enacted including legislation to prevent the imposition of confiscatory economic burdens upon the thousands of lessees presently living on leased property.

Section 2. Chapter 516, Hawaii Revised Statutes, is amended as follows:

1. Section 516-1 is amended to read:

"Sec. 516-1 Definitions. Unless otherwise clear from the context, as used in this chapter:

(1) "Authority" means the Hawaii housing authority created by chapter 356.

(2) "Development tract" means a single contiguous area of real property not less than five acres in size which has been developed and subdivided into residential lots. Two or more pieces of real property shall be considered as a single contiguous area if they would be contiguous except for the interposition or existence of a road, street, stream, fee lot, or other like interference.

(3) "Fair market value" means that amount of money that a purchaser willing, but not obliged, to buy an interest in land would pay an owner willing, but not obliged, to sell it, taking into consideration all uses to which the land is adapted or might in reason be applied.

(4) "Fee simple owner" and "fee owner" mean the person who owns the fee simple title to the land which is leased, including a life tenant with a remainder over, vested or contingent, and a holder of a defeasible estate, and his heirs, successors, legal representatives, and assigns.

(5) "Lease" means a conveyance of land or an interest in land, by a fee simple owner as lessor, or by a

lessee or sublessee as sublessor, to any person, in consideration of a return of rent or other recompense, for a term, measured from the initial date of the conveyance, (A) exceeding thirty-five years (including any periods for which the lease may be extended or renewed at the option of the lessee) as to existing leases and in force on June 24, 1967, or (B) exceeding twenty years (including any periods for which the lease may be extended or renewed at the option of the lessee) as to leases executed after June 24, 1967.

(6) "Leased fee" and "leased fee interest" mean all of the interests of the fee owner, lessor, and all legal and equitable owners of the land which is leased, other than the lessee's interest as defined by this chapter.

(7) "Legal and equitable owners" means the fee simple owner and all persons having legal or equitable interests in the fee or in the lessor's leasehold estate, including mortgagees, developers, lienors, and sublessors, and their respective heirs, successors, legal representatives, and assigns.

(8) "Lessee" means any person to whom land is leased or subleased, and his heirs, successors, legal representatives, and assigns.

(9) "Lessor" means any person who leases or subleases land to another, and his heirs, successors, legal representatives, and assigns.

(10) The terms "lessor," "lessee," "fee simple owner," "fee owner," and "legal and equitable owners" include individuals, both masculine and feminine, and, except as to the term "lessee," the terms also include corporations, firms, associations, trusts, estates, and the State or its political subdivisions. When more than one person are the lessors, lessees, fee simple owners, fee owners, or legal and equitable owners of a lot, the terms apply to each of them, jointly and severally.

(11) "Lot," "housetot," "residential lot," and "residential houselot" mean a parcel of land, two acres or less in size, which is used or occupied or is developed, devoted, intended, or permitted to be used or occupied as a principal place of residence for a single family.

(12) "Offsite improvements" means all physical improvements such as, but not limited to roads, sewer lines, sewage treatment plants, gutters, curbs, sidewalks, fire hydrants, street lights, land dedicated for public purposes and underground electric cables, constructed or placed in a subdivision off the lots intended for occupancy, which improvements are to be used in common by occupants of all lots adjoining such improvements or by the occupants of all lots whose benefit the improvements have been constructed or placed.

(13) "Onsite improvements" means all physical improvements placed on a residential lot intended for occupancy which improvements are for the benefit of occupants of that lot, including, but not limited to, dwelling units, garages, service buildings, stairs, walkways, driveways, walls, trees, shrubs, landscaping, and pools.

(14) "Owner's basis" means the current fair market value of the lot excluding onsite improvements, valued as if the fee title were unencumbered, less the lessee's share, if any, of the current replacement cost of providing existing offsite improvements attributable to the lot, which replacement cost shall include an overhead and profit not exceeding twenty per cent of the current replacement cost of the existing offsite improvements, or the original lot development credit to the lessee, whichever is greater, plus the unpaid balance, if any, owing to the lessor by the lessee as reimbursement other than as a part of the lease rent for the actual offsite improvement costs paid by the lessor."

2. Section 516-2 is amended to read:

"Sec. 516-2 Applicability. This chapter applies to all lands leased as residential lots which are owned or held privately or owned by the State or its political subdivisions except Hawaiian home lands which are subject to Article XI of the Constitution of the State and lands owned or held by the federal government. This chapter is not meant to supersede or preclude any other remedy at law available to residential leasehold lessees or the State, including those available under chapter 480."

3. Section 516-4 is amended to read:

"Sec. 516-4 Trusts and estates. The rights granted to lessees by this chapter shall be effective, notwithstanding any condition or provision to the contrary in any instrument creating any life tenancy, defeasible fee, estate, or trust, regardless of whether such tenancy, fee, estate or trust was in effect prior to June 24, 1967 or is created hereafter; and the life tenant, holder, officer, or trustee of any such tenancy, defeasible fee, estate, or trust may convey residential leases for terms exceeding twenty years and shall perform any acts required of him by this chapter. Every such instrument now in existence or hereafter executed shall be construed in conformity with the intent and purpose of this chapter. No trustee, officer, or agent of a lessor or other legal or equitable owner shall, while acting pursuant to this chapter, be deemed to be acting in bad faith or to have committed a breach of trust."

4. Section 516-7 is amended to read:

"Sec. 516-7 Authority's duties, generally. In addition to any other duty prescribed by law and in this chapter, the Hawaii housing authority shall:

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(7) Acquire by eminent domain proceedings, all necessary property interests as provided in this chapter;

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5. Section 516-21 is amended to read:

"Sec. 516-21 Applicability. This part applies to development tracts which are, at the time of acquisition of leased fee interests in residential lots within such tracts by the Hawaii housing authority as herein:

(1) Developed and subdivided into residential house-lots occupied by lessees under leases executed before June 24, 1967;

(2) Developed and subdivided or partially developed into residential house-lots occupied or to be occupied by lessees under leases executed after June 24, 1967, provided that ten or more years remain before the final termination of the lease term, and provided further that ninety per cent of the leases to the lots have been executed."

6. Section 516-22 is amended to read:

"Sec. 516-22 Designation of leased fee interest in all or part of development tract for acquisition. The Hawaii housing authority may designate all or a portion of a development tract for acquisition and acquire leased fee interests in residential house-lots in such development tract, through the exercise of the power of eminent domain or by purchase under the threat of eminent domain if, after due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the county in which the development tract is situated on at least three different days, the last publication being not less than five days before the date of hearing, the authority finds that the acquisition of the leased fee interest in residential house-lots in all or part of the tract through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof, as provided in this part will effectuate the public purposes of this chapter and shall also find either:

(1) That a shortage of fee simple residential property exists in the county and that the acquisition and

disposition of the leased fee interests in residential houselots in all or part of the development tract by the authority as provided in this part will assist in alleviating this shortage pursuant to the purposes of this chapter, or

(2) That twenty-five or more lessees or the lessees of more than fifty per cent of the residential lease lots within the development tract, whichever number is the lesser, have applied to the authority to purchase the leased fee interest in their residential leasehold lots pursuant to section 516-33.

The findings of the authority shall be conclusive in any suit, action, or proceeding."

7. Section 516-23 is amended to read:

"Sec. 516-23 Exercise of power of eminent domain. Within twelve months after the designation of all or part of the development tract for acquisition, the Hawaii housing authority shall acquire through voluntary action of the parties, or institute eminent domain proceedings to acquire the leased fee interest in the tract or portion so designated; provided that negotiations for acquisition by voluntary transaction shall not be required before the institution of eminent domain proceedings. Except as otherwise provided in this part, the authority shall exercise its power of eminent domain in the same manner as provided in chapter 101. If the development tract or applicable portion thereof, as the case may be, is not acquired or eminent domain proceedings are not instituted within the twelve-month period, the authority shall reimburse the fee owner, the lessor and the legal and equitable owners of the land so designated for actual out-of-pocket expenses of appraisal, survey, and attorney fees as the owner, lessor, and the legal and equitable owners may have incurred as a result of the designation."

8. Section 516-24 is amended to read:

"Sec. 516-24 Compensation. The compensation to be paid for the leased fee interest in a residential houselot within a development tract shall be the owner's basis as defined in section 516-1(14). The compensation shall be determined as of the date of the designation of the applicable portion of the development tract for acquisition."

9. Section 516-25 is amended by amending subsection (a) to read:

"(a) Upon acquisition of the leased fee interest in residential houselots within all or a portion of a development tract as provided in this part, the property interest acquired by the Hawaii housing authority is all of the right, title, and interest of the fee owner, and of the lessor and all legal and equitable owners, if any, in and to the residential houselots acquired; subject to existing leases of residential houselots within the development tract, and to all covenants, conditions, easements, reservations, and restrictions of record running with the land or contained in the agreement of sale, deed, or other conveyance held by the fee owner, lessor, and legal and equitable owners or permitted or suffered by lessees of existing residential houselot leases, which are not inconsistent with the intent of this part. The acquisition terminates all the right, title, and interest of the fee owner, lessor, and all legal and equitable owners, whether the interest be a remainder, vested or contingent, a reversion, or other beneficial interest in the property, present or prospective."

10. Section 516-26 is amended to read:

"Sec. 516-26 Interest in compensation paid by the authority. The fee owner, lessor, and all legal and equitable owners shall share in the compensation paid by the Hawaii housing authority as their respective interests appear. Notwithstanding any contrary provision in any contract or lease, a developer or other person entitled to share in

the lease rentals shall share in such compensation paid by the authority to the extent of his interest as may be determined by agreement of those entitled to share in the compensation paid by the authority, or in the absence of such agreement, pursuant to chapter 658."

11. Section 516-28 is amended to read:

"Sec. 516-28 Disposition, generally. It shall be the policy of the Hawaii housing authority to encourage the widespread fee simple ownership of residential lots situated within a development tract. Where necessary or desirable, the authority may lease the residential lots. Not more than one lot shall be sold in fee simple or leased to a purchaser or lessee. A husband and his wife together, unless separated and living apart under a decree of separation issued by a court of competent jurisdiction, shall be entitled to only one lot.

12. Section 516-30 is amended to read:

"Sec. 516-30 Purchase of leased fee interest. The lessee of a residential lot within a development tract, whether he was a lessee at the time of the acquisition or became a lessee after the acquisition of the development tract, who has applied to the authority and has qualified for purchase of the leased fee interest shall purchase from the Hawaii housing authority by contract within sixty days of acquisition of the interest by the authority, the leased fee interest to the lot, subject to the terms, covenants, and conditions of the contract executed with the authority; provided that the lessee is not then in default in the performance of his obligations under the lease; and further provided that should any of said lessees fail or refuse to enter into such a contract, then in such event, each such lessee shall pay to the authority his pro-rata share of all costs incurred by the authority in the acquisition of the houselots within the development tract including but not limited to appraisal costs, costs of publication, and

survey, and the authority is hereby authorized to take whatever action it deems necessary to collect such costs; and provided further that in case of a wilful breach of the purchase agreement the authority shall be entitled to any available remedy, including the sale of its interest in the house lot; and further provided that the sales price shall be at the lowest possible price consistent with section 516-32 and the purpose of this chapter."

13. Section 516-33 is amended to read:

"Sec. 516-33 Qualification for purchase. Except as otherwise provided under section 516-28, no sale of any residential house lot within a development tract shall be made to any person unless he meets the following requirements:

- (1) Is at least eighteen years of age;
- (2) Is a bona fide resident of the State and has a bona fide intent to reside in the development tract if successful in purchasing the lot;
- (3) Is a bona fide owner of a residential structure situated on the leased lot applied for;
- (4) Has a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that he will be able to promptly pay the authority for the leased fee interest in the lot;
- (5) Submits an application in good faith accompanied by a deposit to be established by the authority, not to exceed \$500, as earnest money to be applied to the purchase price;
- (6) Executes a contract for purchase of fee interest in such form as is acceptable to the authority; and
- (7) Does not own in fee simple lands suitable for residential purposes within the county and in or reasonably near the place of business of such person or has or have pending before the Hawaii housing author-

ity an unrefused application to lease or purchase a lot in a development tract. A person is deemed to own lands herein if he, his spouse, or both he and his spouse (unless separated and living apart under a decree of a court of competent jurisdiction) owns lands.

In the event of a wilful breach of contract of a lessee to purchase the leased fee interest, the authority may sell or assign its interest without respect to the requirements of this section.

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14. Section 516-34 is amended to read:

"Sec. 516-34 Mortgages, agreeemnts of sale, other instruments. (a) If an applicant who wishes to purchase the leased fee interest in his residential leasehold lot is unable to obtain sufficient funds at reasonable rates from private lenders, the Hawaii housing authority may, by way of mortgage, agreement of sale or other instruments to secure the indebtedness, loan to the purchaser up to ninety per cent of the purchase price; provided that such agreement of sale shall be for a term not to exceed three years; provided further that the authority, upon its discretion, may extend such agreement of sale for not more than two years if the lessee requests such extension. In case of any dispute of the extension of the agreement of sale, the lessee shall bear the burden of proof to show good cause for such extension.

(b) The purchaser of the leased fee interest shall pay not less than ten per cent of the price and execute with the authority an agreement of sale, or mortgage, or other instrument to secure the indebtedness under the terms of which the unpaid balance and interest thereon, at a reasonable rate determined by the authority, shall be paid in monthly installments over such periods as the authority may determine. Every mortgage, agreement of sale, other instruments to secure the indebtedness, or instrument of indebtedness shall be freely assignable by the authority and

may contain such other provisions as are usually found in such instruments and shall provide that the purchaser may prepay the whole or any part of the unpaid balance of the purchase price plus accrued interest at any time without prepayment penalty.

(c) If the purchaser defaults on the payment of any loan, the authority shall take all necessary action to collect the delinquent principal and interest on the loan and may take all actions allowed to holders of obligations, including the power to repossess, purchase, lease, rent, repair, renovate, modernize, and sell the property foreclosed."

15. Section 516-35 is amended to read :

"Sec. 516-35 Restrictions on sale and use of residential lots. (a) For a period of ten years after the purchase from the authority of the leased fee interest in a residential lot, the purchaser shall not transfer any interest in the property unless he has first notified the authority in writing of his intention to do so.

The notice shall specify the purchaser's address and shall expressly offer the authority the right of first refusal, at a price which shall not exceed the amount of the original cost to the purchaser together with the cost of any improvements added by the purchaser together with simple interest on all of the purchaser's equity in the property at the rate of seven per cent a year; provided that title to a dwelling unit and the property or lease may pass to a family member by devise or through the laws of descent, who would otherwise qualify under the rules and regulations established by the authority.

(b) Within thirty days after the receipt of the notice the authority shall in writing notify the purchaser at the address so specified whether it elects to exercise its option. If the authority refuses, or fails within the thirty-day period to reply to the offer, the lessee or purchaser may trans-

fer any interest in the property to any person, free from any price restrictions.

(c) The authority may lease, rent, or resell any lot and improvements purchased by it under this part.

(d) Any original lease, deed, agreement of sale, mortgage, and other instruments of conveyance issued by the authority under this part shall expressly contain the restriction on sale and use of the residential lot as prescribed in this section."

16. Sections 516-36 through 516-39 are repealed.

17. Section 516-45 is amended to read :

"Sec. 516-45 General obligation bonds. The director of finance may, from time to time, issue general obligation bonds in such amounts as may be authorized by the legislature, for the purpose of acquisition by the Hawaii housing authority of residential houselots within development tracts pursuant to chapter 516, part II or for the acquisition of suitable properties to exchange pursuant to section 516- or for the acquisition by the department of land and natural resources under section 171- of suitable properties for exchange pursuant to section 171- to effectuate the purpose of this chapter. The principal and interest of general obligation bonds issued pursuant to this section shall be reimbursed to the general fund from the fee simple residential revolving fund as provided in section 516-44. Pending the receipt of funds from the issuance and sale of general obligation bonds, amounts required within the limits of legislative authorization may be advanced to the Hawaii housing authority from the general fund of the State. Upon the receipt of the bond funds, the general fund shall be reimbursed the amount advanced."

18. Section 516-66 is amended to read :

"Sec. 516-66 Lease rental. In every case of an extension under section 516-65 the annual lease rental during the first

thirty years shall not exceed an amount determined as follows:

. . .

19. Section 516-70 is amended to read:

"Sec. 516-70 Reversion of improvements. (a) This section applies to all leases of residential lands as defined by section 516-1(5).

(b) At the termination of any lease, or at the expiration of the lease term, the lessee may, if not then in default under the terms of his lease, remove all onsite improvements on the lot which were constructed at the cost of, or otherwise paid for by the lessee, without compensating the lessor therefor. If the lessee notifies the lessor in writing within sixty days before the termination or expiration that he declines to remove such onsite improvements and if the lessee is not then in default under the terms of his lease, and if the lessor refuses to extend the term of the existing lease or to issue a new lease for a term of at least thirty years at a rental that is mutually agreeable to the parties or failing such agreement that is determined by arbitration pursuant to chapter 658, the lessor shall be required to compensate the lessee for the current fair market value of all such onsite improvements. Such improvements shall be appraised at the expense of the lessee. The appraiser selected shall be by mutual agreement of the lessee and the lessor or in conformance to chapter 658. The compensation shall be determined by mutual agreement or in conformity with chapter 658, and the compensation shall be paid within thirty days of determination. Such expense of arbitration shall be equally shared by both parties."

20. Section 516-81 is repealed.

21. Chapter 516 is amended by adding the following new sections, to be appropriately designated and to read:

"Sec. 516- Exchanges. (a) The authority may exchange public lands for private lands to be condemned or

involuntarily sold pursuant to this chapter; provided that any such exchange shall be subject to legislative disapproval; provided further that lands exchanged need not be of like-kind or comparable use; and provided further that no lands classified as conservation shall be exchanged for private lands.

(b) The authority may acquire private lands by negotiated sale for purposes of exchanging such land with private lands pursuant to subsection (a). The legislature declares that such acquisition is for the public purpose of encouraging home ownership on as widespread a basis as possible.

Sec. 516. Severability.

. . .

Section 3. Chapter 171, Hawaii Revised Statutes, is amended by adding the following two new sections, to be appropriately designated and to read:

"Sec. 171- Acquisition of lands for exchange under chapter 516. The board may acquire private lands by negotiated purchase to be exchanged to effect the conversion of leasehold lands to fee simple ownership under section 171- . The legislature declares that such acquisition is for the public purpose of encouraging home ownership on as widespread a basis as possible.

Sec. 171- Exchanges for conversion of leasehold lands to fee simple ownership. The board may exchange public lands for private lands to be condemned or involuntarily sold pursuant to chapter 516. Such exchange shall be requested by the executive director of the Hawaii housing authority, and shall be effected in conformity in section 171-50; provided that such exchange shall be subject to legislative disapproval; provided further that the private lands conveyed to the State shall be disposed of pursuant to chapter 516; and provided further that lands exchanged

need not be of like-kind or comparable use; provided further that no lands classified as conservation shall be exchanged for private lands."

Section 4. Section 2 of Act 215, Session Laws of Hawaii 1971, is amended to read as follows:

"SECTION 2. The director of finance is authorized to issue general obligation bonds of the State in the amount of \$5,000,000, for the purpose of acquisition by the Hawaii housing authority of development tracts, or exchange of lands therefor, pursuant to chapter 516, part II, Hawaii Revised Statutes. Pending the receipt of funds from the issuance and sale of general obligation bonds, amounts required within the limits of authorization may be advanced to the Hawaii housing authority from the general fund of the State. Upon the receipt of the bond funds, the general fund shall be reimbursed the amount advanced."

[omitted]

SECTION 6. This Act shall take effect upon its approval.

(Approved June 2, 1975.)

Appendix F

ACT 185

H.B. NO. 55

A Bill for an Act Relating to the Hawaii Lease Rent Renegotiation Relief Act. *Be It Enacted by the Legislature of the State of Hawaii:*

Section 1. Findings and purposes. The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

The home is the basic source of shelter and security in society, the center of our society which provides the basis for the development of our future citizens. Deprivation through exorbitant and unreasonable prices of this basic need results in frustrations and unrest in our community that is harmful to the overall fiber of our society.

Although Act 307 was enacted in 1967 the fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 percent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 percent of all land.

Along with this concentrated ownership of land there exists in the State of Hawaii a critical shortage of housing units for all income levels. There will be a need for over 250,000 low and middle income units by 1985 and a need will exist for all types of units. Since 1961 the economy has been producing an average of less than 10,000 low and middle income units annually. The economy has similarly lagged in the production of all other units, except the very high priced.

The small number of private landowners have continued to follow the policy of not selling their lands for resi-

dential use but of leasing their lands under long term residential leases. While fee simple ownership still accounted for 68.9 percent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 percent of all owner-occupied housing units developed on Oahu had been leasehold. Between 1967-1972, 46 percent of such development has been on leaseholds.

The foregoing developments have compelled thousands of people in the State to resort to leasehold residences to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

The predictions of Act 307 as to effects of the residential leasehold system have proven to be conservative. Today, there are over 26,000 outstanding residential leases, an increase of more than 10,000, since Act 307 was enacted. As stated in Act 307, the concentration of land ownership "is in the rapidly developing urban areas of the State, where the need for single family residential lots is critical".

Initially, lease rents were low or were within the range which the public could afford. However, in the renegotiation of rents that have occurred in recent years, tremendous increases in lease rents have been imposed upon countless lessees by lessors. The compensation provided to be paid to lessors under Act 307 was directly related to the present value of the lease income stream generated under the lease to be condemned. Since June 24, 1967 lessors have generally adopted a practice of increasing lease rentals on renegotiations of existing leases in a manner unrelated to the raw land value, thereby greatly increasing the cost to the lessee when exercising his rights under Act 307 and resulting further in unconscionably increasing lease rents.

Renegotiation has brought about staggering increases in annual lease rentals. These increases have been the direct result of inflated land values which in turn have come about because of the supply of urban land for residential housing under the concentrated ownership described in the findings contained in Act 307. The effect of these increases has been to substantially increase the cost of leasing housing for the people of Hawaii. The increases in lease rentals and premiums required prior to leasing of residential property has accentuated the problem stated in section 1(g) of Act 307 to the effect that the continuation of the residential leasehold system causes an artificial inflation in the price of fee simple residential property, as well as leasehold residential property.

Further, because of the unequal bargaining power between large landowners and individual lessees there have been breakdowns in the normal processes of bargaining and freedom of contract, resulting in unjust, unreasonable and oppressive lease rents being exacted by lessors. Thus the limited supply of housing units and concentrated ownership of such units have led to the exaction of exorbitant lease rents on renegotiation. In many instances, the lessor's terms are peremptorily submitted to the lessee in ultimatum form through letters rather than through any actual bargaining process.

This unequal bargaining relationship exists today despite the rights granted lessees under Part III of Act 307 which was passed some seven years ago. Accordingly the adverse and harmful effects sought to be alleviated by that Act have not been stemmed, but to the contrary have become more critical.

In addition the inequality of bargaining power due to the oligopolistic imbalance in land ownership has allowed the lessor to charge lease rents based not only on the raw land value of the property but also on improvements which have

already been paid for by the lessee and on the value accruing thereon; thus the lessee is, in effect, paying the lessor for an investment made by the lessee. This is an unjust enrichment created by an oligopolistic market lacking competitive bargaining and is contrary to the public welfare.

Inasmuch as the free market cannot correct this situation because of the lack of competition, inherent in an oligopolistic market, it is necessary for the public good and welfare that the imbalance be redressed.

Residential leaseholds have had and continue to have undesirable economic effects. The high prices commanded for leasehold units have encouraged the development of leasehold residential units and have discouraged the development of fee simple units. The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) as much as 1000 percent; renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated. These new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages. Rental renegotiations have strongly favored the lessor, with the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold, although the lease may yet have 25 or more years to run. The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g., a house appraised at \$68,000 before renegotiation of lease rent has been appraised at \$59,000 after the lease rental was increased), causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

Residential leaseholds have had undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to

30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase other housing. These situations have grave effects on the health, welfare and well-being of elderly persons and aggravate the already acute need for government-sponsored, low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future.

The legislature declares that it is the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms; that the public health, safety and welfare of the people of Hawaii demand that legislation be enacted to prevent the imposition of confiscatory economic burdens upon the lessees of residential property; that pursuant to and based upon the findings stated above, the public health, safety, and welfare is severely and substantially affected and threatened, resulting in immediate, continuous, and irreparable harm and that all the conditions and circumstances set forth herein constitute a social emergency which it is the purpose of this act to prevent and remedy.

SECTION 2. Chapter 519, Hawaii Revised Statutes, is amended as follows:

1. Chapter 519 is amended by amending its title to read:

"REAL PROPERTY LEASES"

2. Chapter 519, is amended by adding a new section to be appropriately designated and to read:

"Sec. 519- Residential leases of real property. (a) All leases for residential land, as defined by section 516-1, existing on the effective date of this Act or entered into thereafter, which provide for reopening of the contract for renegotiation of lease rent terms shall in the case of leases after the effective date of this Act provide the following, or in the case of leases existing on the effective date, shall be construed in conformity with the following:

[omitted]

SECTION 3. [omitted]

SECTION 4. [omitted]

SECTION 5. This Act shall take effect upon its approval.

(Approved June 2, 1975)

Appendix G

ACT 186

S.B. NO. 1543

A Bill for an Act Relating to Residential Leaseholds and the Acquisition by the State Through Condemnation of Lands in Fee Simple and the Disposition Thereof.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Findings and purpose. Act 307, Session Laws of Hawaii 1967, now Chapter 516, Hawaii Revised Statutes, was intended to lessen the adverse consequences of the excessive concentration of the fee title to lands in Hawaii in the hands of a few owners by allowing residential leaseholders to acquire the fee simple title absolute or otherwise, to real property they were leasing.

The legislature finds that although the Act has been in full effect for nearly six years it has not been implemented. Many reasons have been cited for the failure to put the Act into effect including possible legal or constitutional difficulties inherent in the original Act.

The purpose of this Act is to reaffirm and reiterate the findings and declarations of necessity originally set forth in Act 307 and to amplify and clarify those findings and declarations of necessity.

SECTION 2. Chapter 516, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read:

"Sec. 516- Legislative findings and declaration of necessity; purpose. (a) The legislature finds that:

(1) There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and

who have instead engaged in the practice of leasing their lands under long-term leases;

(2) The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State;

(3) Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long-term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land;

(4) The economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated and the required acceptance of such long-term leases of such lands;

(5) The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such in fee simple will alleviate these conditions and will promote the econ-

omy of the State and public interest, health, welfare, security, and happiness of the people of the State;

(6) The cost of living in Hawaii is and has been high. In recent years inflation has drastically increased the cost of living in the State. The spiraling cost of living affects all people through erosion of the purchasing power of whatever monetary resources they command. For a growing proportion of Hawaii's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land whether leasehold or fee. Stabilizing the costs of land or, at least, slowing the artificial inflation of land value would curb the rising cost of living in Hawaii and, ultimately, contribute to the welfare of all people of the State by improving their standard of living.

(7) The Constitution of the State of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living compatible with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility

is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values.

(8) The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few.

(9) Land, in common with other natural resources, is of finite quantity; a fact particularly obvious in Hawaii. In recent decades there has been growing general agreement that the wise conservation, preservation, use and management of exhaustible natural resources such as land are matters mandating an active governmental role. There is an intimate relationship between the monetary values accorded land in Hawaii and the stability and strength of the State's economy as a whole. Land values, artificially inflated by the high concentration of ownership, skew the State economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high land values creates a potential for economic instability and disruption. Economic inflation, instability and disruptions have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and forestalling disadvantageous economic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the realization of these public purposes serve a public use since they ultimately ben-

efit the entire community. Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention including exercise of the power of eminent domain to acquire fee simple title to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State, will help satisfy the pressing public necessity for a secure, strong and stable economy.

(10) The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this Act is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii.

(11) Inflation lessens the quality of life of all members of this afflicted society and is particularly invidious in its impact on the 90 plus per cent of the population who are in the poverty, and low through middle income groups. The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. There is a pressing public necessity for the State to do whatever it can to curb inflation and to keep the cost of living at a level where it is possible and manageable to provide all citizens a decent and healthful standard of life. The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this Act.

(12) The use of the power of eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose;

(13) Legislation providing to people who are lessees under long-term leases of residential land on which their homes are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

(b) It is therefore declared to be necessary and it is the purpose of this chapter to alleviate the conditions found in subsection (a) of this section by providing for the right of any person who is a lessee under a long-term lease of residential land in the State to purchase at a fair and reasonable price the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefor by the State through the use of the power of eminent domain and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State."

SECTION 3. [omitted]

SECTION 4. [omitted]

(Approved June 2, 1975.)

Appendix H

No. 8489

In the Supreme Court of the State of Hawaii

October Term 1982

Civil No. 60945

Hawaii Housing Authority, a public body and
a body corporate and politic.
Plaintiff-Appellee,

vs.

George II Brown, John Cline Mann
and Napua Stevens Poire,
Defendants-Appellants,

and

Addison W. Y. Chang, et al.,
Defendants.

Appeal from the order granting partial summary
judgment, filed November 4, 1981
First Circuit Court

Honorable Arthur S. K. Fong, Judge

Filed Nov. 10, 1982

Lum, Nakamura, Padgett and Hayashi, JJ.¹

¹Richardson, C.J., recused himself after oral argument. The case is being decided by the remaining justices pursuant to § 602-10, HRS, as amended.

MEMORANDUM OPINION

This case, like *Hawaii Housing Authority v. Castle, et al.*, No. 8468, decided this day, presents an appeal from an order granting a partial summary judgment determining that a taking of lots in a residential subdivision by the Appellee, Hawaii Housing Authority (HHA), under the provisions of Chapter 516, HRS, was a public use as that term is used in the Fifth Amendment to the Constitution of the United States and in Section 20 (formerly Section 18) of Article I of the Constitution of the State of Hawaii.

Although there are procedural differences in the two cases,² we have in this case also, an inadequate record³

²Appellants originally raised the issue of lack of public use as a defense in their answer thus literally complying with § 101-34, HRS. Subsequently, they withdrew this defense. Procedural maneuvering followed—in the course of which the Appellee Lessees moved for a partial summary judgment on the issue of public use. Appellants then moved to dismiss the Appellee Lessees as parties and alternatively to amend their answer to reassert the withdrawn defenses. The court below heard the motions together and granted the partial summary judgment but denied the amendment. The denial of the amendment is, of course, not appealable at this stage of the proceedings without some further action by the court below. Appellee Lessees argued that the order granting the partial summary judgment is not appealable under § 101-34, HRS. We, however, look to the substance of what happened below and therefore disagree with that position.

³The only statistical evidence before the court below was offered by appellants. The record gives no indication what, if anything, of that nature the legislature considered.

with respect to the evidentiary basis for the legislative findings of fact. On the authority of *HHA v. Castle, supra*, we reverse and remand for a trial upon the issue of public use pursuant to the provisions of § 101-34, HRS.

Reversed and remanded.

DATED: Honolulu, Hawaii, November 10, 1982.

Clinton R. Ashford (Albert I.
Moon, Jr. and Rosemary T. Fazio
on the briefs, Ashford & Wriston
of counsel) for appellants /s/

Yukio Naito, Deputy Attorney
General, for appellee Hawaii
Housing Authority /s/

Dennis E. W. O'Connor (I. Nelson /s/
Rose on the brief, Hoddick,
Reinwald, O'Connor & Marrack
of counsel) for defendant Lessees/s/

Appendix I

In The Supreme Court Of The State Of Hawaii

October Term 1982

Hawaii Housing Authority, a public body and a body corporate and politic, Plaintiff-Appellee, v. James C. Castle, James Gordon McIntosh, Hawaiian Trust Company, Limited, Hawaii corporation, Defendant-Appellants, and Everett A. Adams, et al., Defendants

No. 8468

Appeal From First Circuit Court
Honorable James H. Wakatsuki, Judge

(Civil No. 62181)

November 10, 1982

Lum, Nakamura, Padgett and Hayashi, JJ.¹

[Filed Nov. 10, 1982]

JUDGMENT—on motion or summary proceedings—constitutionality.

In an eminent domain proceeding where the issue of public use is raised by a challenge to the constitutionality of the statute authorizing the condemnation; where that issue is one of first impression; and where it is not clear-cut and simple, a trial as provided by § 101-34, HRS, should be held rather than proceeding by way of summary judgment.

¹Richardson, C.J., recused himself after oral argument. The case is being decided by the remaining justices pursuant to § 602-10, HRS, as amended.

Per Curiam. This is an appeal under § 101-34, HRS, from an order granting a motion for partial summary judgment, made by Appellee Hawaii Housing Authority and joined in by the Appellee Lessees, determining that the taking by eminent domain in this case was for a public use. We reverse and remand.

The Appellee, Hawaii Housing Authority (HHA), filed this action, pursuant to Chapter 516, HRS, to condemn the reversionary interest of the lessor/landowner appellants in certain residential leasehold lots situate in Maunawili on the Island of Oahu. The principal issues argued in this case relate to the constitutionality of Chapter 516, to wit: whether or not the taking is for a "public use" under the United States and Hawaii Constitutions. The answer to those questions may very well turn upon the sustainability of the findings of fact by the legislature when it enacted and amended Chapter 516. Yet there is a paucity of material bearing on that matter in the record.

In support of the motion for partial summary judgment, Appellee HHA filed in the court below a photostatic copy of a certified copy of findings of fact and conclusions of law with respect to the issue entered in an earlier case involving a different landowner, together with the decision of the United States District Court for the District of Hawaii in a different case involving a different landowner. Obviously, a photostat of a certified copy is not a certified copy and does not comply with Rule 56(e), HRCp. Obviously, also, the decision of the United States District Court in question (which we understand is presently on appeal) may have precedential value with respect to the Constitution of the United States, but has no binding effect on us with respect to the Constitution of the State of Hawaii. Appellants filed nothing in the way of factual material in opposition to the motion for summary judgment. They did file a motion for summary judgment contending that the

statute was facially unconstitutional but no factual showing in support thereof was made.

We are thus being asked to pass upon two questions of vast public import, i.e. whether a taking by eminent domain under the provisions of Chapter 516, HRS, is a "public use" within the meaning of that term as used in the Fifth Amendment to the Constitution of the United States and within the meaning of that term as used in Section 20 (formerly Section 18) of Article I of the Constitution of the State of Hawaii. The record, however, is devoid of any substantial evidence of what the legislature had before it when it enacted what is now Chapter 516 and the amendments thereto.

We are aware that there have been a number of eminent domain actions brought under Chapter 516, HRS. However, the present case and No. 8489 (which was argued the same day) are the first to come before us. The case is therefore one of first impression.

The Supreme Court of the United States said over 30 years ago:

But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import. . . .

Kennedy v. Silas Mason Co., 334 U.S. 249, 256-57, 68 S.Ct. 1031, 1034, 92 L.Ed. 1347, 1350 (1948). Our decisions have consistently been in accordance with that statement. *Molokai Homesteaders Co-operative Ass'n v. Cobb*, 63 Haw. 453, 457-58, 629 P.2d 1134, 1139 (1981); *Keller v. Thompson*, 56 Haw. 183, 193-94, 532 P.2d 664, 671-72 (1975); *Credit Associates of Maui v. Leong*, 56 Haw. 104, 106, 529 P.2d 198, 199 (1974); *State v. Zimring*, 52 Haw. 472, 475-76, 479 P.2d 202, 204-205 (1970). Section 101-34, HRS, upon which this appeal is based, calls for a trial upon the issue of public use. Since, as we have said, the

case is, with respect to the "public use" issues, one of first impression, we are unwilling to decide the constitutionality of the statute without a trial, pursuant to the statute, being held. Such a trial would give us a record containing evidence together with the findings of fact and conclusions of law of the court below which would greatly aid our consideration of these issues of public importance. We therefore reverse and remand to the circuit court to follow the statutory procedure.

Reversed and remanded.

William C. McCorriston
(Goodsill Anderson & Quinn of
counsel) for appellants /s/

Yukio Naito, Special Deputy Attor-/s/
ney General, for appellee Hawaii
Housing Authority /s/

Anthony P. Locricchio for defend-
ant Lessees /s/

Appendix J

United States Court of Appeals for the Ninth Circuit

**Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching,
Matsuo Takabuki and Myron B. Thompson,
Trustees of the Kamehameha Schools/Bishop Estate,
Plaintiffs/Appellants,**

vs.

**Paul A. Tom, et al.,
Defendants/Appellees,**

and

**Wai-Kahala Tract "H" Association, Inc., et al.,
Intervenors-Defendants/Appellees.**

July 14 1980	Docketed cause & entered appearances of counsel. ec
Jul 25	Filed Certificate of Record (1/26/80). ss
Jul 25	Aplt (Midkiff) opening brief due 9/3/80. ss
Aug 12 1980	Fld mtn & ord (Clk) gtng Aplt/Pet ext of time to fl opng/reply brf to: Oct 20 1980 kf
Oct 20	Filed orig & 15 aplt's opening briefs & 5 Excerpts. (10/20) ogm
Oct 20	Filed 10 aplt's appendices (Statutes, Rules, Regulations, etc.,) (10/20). ogm
Nov 14 1980	Fld mtn & ord (Clk) gtng Aple/Resp ext of time to fl answg brf to: Jan 21 1981 Sh
Nov 21 1980	Fld mtn & ord (Clk) gtng Aple/Resp ext of time to fl answg brf to: Tom Jan 21 1980 kf

- Nov 24 Fld mtn & ord (dep clk) granting Int/aples Kahala Comm Assoc & Kahala Comm Fee Purch Fund's an ext of time to file brief to Jan 21, 1981.—kf—
- Nov 24 Fld mtn & ord (dep clk) granting Int/aple Wai-Kahala Tract H an ext of time to file brief to Jan 21, 1981.—kf—
- Nov 25 Fld mtn & ord (dep clk) granting Int/aple Halawa Valley Estates an ext of time to file brief to Jan 21, 1981.—kf—
- Jan 13 1981 Fl mtn & ord (Clk) gtng Aple (Paul A. Tom, et al.,) ext of time to fl their Answering brief to: 2-20-81. bbm
- Jan 16 Fld mtn & ord (Clk) gtng Intervenors-Aples (Wai-Kahala Tract "H" Assoc., et al.,) ext of time to fl their brief to: 2-20-81. bbm
- Jan 20 R'cvd as of 1/19, orig & 15 intervenor/aples' briefs (Portlock Community Association, Kokohead Community, etc.,); no proof of service; no Rule 13 (e & j); notified counsel by letter. ogm
- Jan 27 Fld mtn & ord (Clk) gtng Interven.-Aples (Kahala Community Assoc. & Kahala Community Fee Pur. Fund) ext of time to fl brief to 2-20-81. bbm
- Jan 29 Filed as of 1/19, orig & 15 intervenor/aples' briefs (Portlock Community Asso., et al., (1/19/81); deficiencies corrected. ogm
- Feb 9 Fld mtn & ord (Clk) gtng Aplts (Frank E. Midkiff & et al.,) an ext of time to file Reply brief to: 3-9-81. bbm

- Feb 23 Filed orig & 15 Int/Aple (Wai-Kahala Tract "H" Ass'n) ans brief (2/20). pf
- Feb 23 Filed orig & 15 Int/Aple (Kahala Community Ass'n) ans brief (2/20). pf
- Feb 24 Filed orig & 15 Aple's (Tom et al.) ans brief (2/20). pf
- March 9 Filed aplts' motion for first and second exts of time in which to file reply brief with affidavit of Clinton R. Ashford in support of. (Civatt) 3/5—rmc—
- March 12 Filed order (Mo Atty) aplts are granted an ext of time to and including April 23, 1981 in which to file their reply briefs. This order is subject to reconsideration by a judge if any opposition is filed within ten (10) days of the entry of the order. —rmc—
- March 26 Filed as of 7/25/80 Cert Record on Appeal in Fourteen Vols, Pldgs, Vol I-IV copy R/T Vol V-XIV orig pv
- Apr 24 Filed as of 4/23, orig & 15 aplts' reply briefs. (4/23) ogm
- Oct 13 Filed motion of intervenor-appellees (Kahala Community Association, Inc. & Kahala Community Purchase Fund) for add'l time for oral argument to (panel). jr 10/9/81
- Oct 13 Rec'd aplts' letter of add'l authority to (panel). jr
- Oct 16 Filed order (Poole) pursuant to the motion for add'l time for oral argument filed on 10/13/81, by intervenor aples, Kahala Community Association, Inc. and Kahala Community Purchase Fund, an add'l 10 minutes oral argument will be allocated to each side. jr

- Oct 21 Argued Before: Alarcon, Poole & Ferguson; CJJ. Ordered from the bench: aplt's counsel will submit a letter brief 7 days from today. Apels' counsel will submit a response 7 days after receipt of aplt's letter brief. Submission deferred until Tuesday, November 3, 1981.
- Oct 30 Rec'd aplt's letter brief requested by court during oral argument to (panel). jr 10/28/81
- Oct 30 Rec'd aples' letter brief requested by court during oral argument to (panel). jr 10/28/81
- Oct 30 Rec'd, as of 10/19/81, intervening aples' (Portlock) letter of 10/14/81 re: errors in the Table of Authorities to (panel). jr
- Nov 3 Rec'd, as of 10/20/81, intervenor's (Kahala Community, et al) letter of add'l authorities to (panel). jr
- Nov 3 Recvd as of Oct. 30 aples' letter brief requested by ct during oral argument. (Panel) 10/28. ag
- Nov 3 Recvd as of Oct. 30 intervenor-apes' (Wai-Kahala Tract "H" Assoc., et al.) letter brief requested by ct during oral argument. (Panel) 10/28. ag
- Nov 3 Recvd as of Nov. 2 intervenor-apes' (Kahala Community Assoc., et al.) letter brief requested by ct during oral argument. (Panel) 10/28. ag
- Nov 3 Cause submitted for decision pursuant to minute order of 10/21/81. jr

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Nov 9	Recvd letter dated Nov. 4 from Rosemary T. Fazio, counsel for apts, re: reply to aples' letter briefs previously recvd. (Panel) 11/4. ag
Dec 10	Recvd letter dated Dec. 7 from Dennis O'Connor, counsel for Intervenor-Aple's Wai-Kahala Tract "H" Assn), re: additional citations. (Panel) 12/9. ag
Dec 17	Recvd letter dated Dec. 15 from Clinton R. Ashford, counsel for apts, re: response to Intervenor-Aple's add'l citations. (Panel) 12/15. ag
1983	
March 29	Recvd intervenor-apes' (Wai-Kahala Tract "H" Assoc., et al.) supplemental letter brief per ct's request at oral argument. (Panel) 3/25. ag
Mar 28	Ordered opinion (Alarcon) Poole concurring & Ferguson dissenting filed & judg to be filed & entd.
Mar 28	Filed Opinion—Reversed & Remanded.
Mar 28	Filed & Entered Judgment. sz
Mar 31	Filed Aplt's Emergency Motion for Preliminary Injunction Pending Issuance of Mandate. 3/30 Panel EM
Apr 1	Filed Aple's Memorandum in Opposition to Emergency Motion for Preliminary Injunction pending appeal; Affidavit of James Case, Dennis O'Connor, and A. Bernard Bays. 3/31 Panel EM
Apr 1	Filed Aplt's Supplemental Memorandum in support of Emergency Motion for preliminary injunction. 3/31 Panel EM

- Apr 5 Filed Intervenor-Appellees Motion in opposition to emergency motion for preliminary injunction pending issuance of mandate; and Withdrawal and Appearance of Counsel. 4/4 Panel EM
- Apr 5 Filed Deft-Aple's (Hawaii) Opposition to Aplt's Emergency Motion for Preliminary injunction pending issuance of mandate. 4/4 Panel EM
- Apr 5 Filed Order (Alarcon, Poole and Ferguson, CJJ) Pending a ruling on aplt's emergency motion for injunctive relief, appellees Hawaii Housing Authority, its agents and representatives, and all those acting in concert with it are restrained from further prosecuting *Hawaii Housing Authority v. Midkiff*, Civ. No. 63408, in the First Circuit Court of the State of Hawaii. At oral argument to be held by a telephone conference call, appellees shall show cause why aplt's motion should not be granted and appellees be required to take all steps necessary to terminate the state proceedings. The parties will be notified subsequently of the time and date of oral argument. Judge Ferguson dissenting. (Case file) ogm
- Apr 6 Filed Intervenor/Appellees' (Kahala Community Assoc., et al.) motion for oral argument and suggestion for hearing en banc on pltfs/aplts emergency motion for preliminary injunction pending issuance of mandate; memorandum in support thereof. 4/5 (Panel) ogm

- Apr 6 Filed Intervenor's/Appellees' (Wai-Kahala Tract "H" Assoc., et al.,) motion for personal appearance and oral argument and suggestion for hearing en banc and aplt's emergency motion to enjoin parties to Hawaii State Court Proceedings. (Panel) 4/5 ogm
- Apr 6 Filed Affidavit of Dennis E. W. O'Connor in opposition to emergency motion for preliminary injunction pending issuance of mandate. (Panel) 4/5 ogm
- Apr 6 Filed deft/appellees' (Hawaii, et al.,) motion for personal appearance at oral argument and suggestion for hearing en banc on aplts' emergency motion to enjoin ongoing Hawaii State Court Proceedings; Affidavit of George R. Ariyoshi. (Panel) 4/5 ogm
- Apr 6 Filed Orig & 33 Intervenor's/Appellees' (Wai Kahala Tract "H" Assoc., et al.,) Petition for Rehearing and Suggestion for Hearing En Banc. (Panel, active judges) 4/5 ogm
- Apr 6 Filed Order (Alarcon, Poole & Ferguson) Aples' request to hold the hearing directed by the court's April 5, 1983 order in person rather than by a telephone conference call is granted. Argument will be held in S.F. on Apr 14, 1983 at 1:30 p.m. Pacific time. No later than Apr. 12, 1983, the parties may file supplemental materials addressing the issues raised by aplts' emergency motion for injunctive relief. In addition to filing these materials with the clerk in S.F., copies may be sent directly to the chambers of the members of the panel. js

- Apr 08 Filed Orig & ee Intervenor-Appellees
[Kahala Comm. Assoc., Inc., et al] Peti-
tion For Rehearing and Suggestion of
Rehearing En Banc. 4/7 (Panel & Active
Judges) -ot-
- Apr 11 Filed Intervenor-Aple's Memorandum in
opposition to aplts Emergency Motion
for Preliminary Injunction Pending Is-
suanee of Mandate; 4/11 Panel EM
- Apr 11 Filed State of Hawaii's Appendix and Ex-
hibits in Opposition to Aplt's Emergency
Motion for preliminary Injunction. 4/11
Panel EM
- Apr 11 Filed Aples' [Hawaii] Petition For Re-
consideration And Suggestion For Re-
hearing En Banc. 4/8 (Panel & Active
Judges) -ot-
- Apr 11 Filed Intervenor-Aples [Portlock Com-
munity Assoc., Kokohead Community
Lease-Fee, Inc.; West Marina Com-
munity Assoc.; and Hahaione Vly Com-
munity Assoc] Petition For Rehearing
Suggestion of Appropriateness of Re-
hearing En Banc. 4/10 (Panel & Active
Judges) -ot-
- Apr 12 Filed Pltfs'/Aplts' Reply Memorandum in
support of the emergency motion; Affi-
davit and Exhs. A thru F, attached
thereof. (Panel) 4/12 ogm
- Apr 12 Filed Intervenor/Aples' Supplemental
memorandum in opposition to emer-
gency motion for prel. injunction pend-
ing issuance of mandate. (Panel) 4/11
ogm

- Apr 12 Filed Hawaii's Supplemental Memorandum in opposition to aplt's emergency motion for prel. injunction pending issuance of mandate. (Panel) 4/11 ogm
- April 13 Filed amicus curiae, Acting Chief Justice (Herman T. F. Lum) and Acting Administrative Head of the judiciary of the State of Hawaii, memorandum in opposing the issuance of federal injunctive relief against state court proceedings in the instant case. gb (4/12) (Panel) w/cover letter
- Apr 14 Filed aplt's Motion to strike Appendix "A" to deft-aples' Memorandum in opposition to Pltff-aplt's Emergency Motion. 4/13 Panel em
- Apr 14 Filed ORDER (Alarcon and Poole) vacating filing of forty exhibits attached to affidavit of Michael A. Lilly. Documents may be lodged with the court subject to later determination as to whether any of the items should become part of the record. c2
- Apr 14 Filed Aplt's Bill of Cost. 4/11 -ot-
- Apr 14 Argument on aplt's emergency motion for injunctive relief before: Alarcon, Poole and Ferguson. c2

- Apr 14 Filed Order (Alarcon, Ferguson and Poole, CJJ) The motion for an injunction directing the parties to stay further prosecution of the matter entitled Hawaii Housing Authority, Plaintiff, v. Frank E. Midkiff, et al., Defts, now pending in the Circuit Court of the First Circuit, State of Hawaii, at Civil No. 63408 thereof, is denied. The order to show cause is vacated and the stay heretofore entered is dissolved. All parties to bear their own costs of this appeal.
ogm
- APR 15 Filed Order (Chief Dep Clk) The motion of Herman T. F. Lum, Acting Administrative Head of the Judiciary of the State of Hawaii, to file an amicus curiae memorandum is granted. The motion of aples' for a hearing en banc on aplt's emergency motion for an injunction is denied. The final word of the order filed Apr 14, 1983 denying the injunction is changed from "appeal" to proceeding."
js
- Apr 21 Filed Intervenor's-Aple's objection to the Bill of Cost. 4/20 -ot-
- Apr 27 Filed intervenor's-able's, (Kamiloiki Community Assos.), Motion for order lodging exhibits one through forty attached to the affidavit of Michael A. Lilly as an appendix; Affidavit of Theodore Y. Uyeno; exhibit "A". 4/25 Panel sz
- Apr 27 Recv'd from the office of the Atty. Gen. of Hawaii, Appearance of counsel Laurence H. Tribe as counsel of record for the defendant/appelles Paul A. Tom, T. Taniguchi, et al.
sz

Apr 28	Filed Aplt's Memorandum In Support of Plaintiffs-Aplt's Bill of Cost. 4/26
Apr 28	Filed Hawaii's Objection To Bill of Costs. 4/26
May 02	Filed Memorandum In Opposition To Hawaii's Objection To Bill of Costs of Plaintiffs-Aplt's. 4/28 -ot-
May 02	Filed Joinder In Objection To Bill of Costs of Bishop Estate. 4/28. -ot-
May 02	Filed (Inter/Aple Halawa Vly) Joinder In Objection To Bill of Costs of Bishop Estate. 4/29 -ot-
May 2	Filed Aplt's (Trustees of the Kamehameha Schools/Bishop Estate) Memorandum in opposition for order lodging exhibits one through forty. 4/29 Panel sz
May 03	Filed Joint Motion To Withdraw Petition For Rehearing And Suggestion For Re- hearing En Banc And An Application To Stay The Mandate Pending An Appeal To The United States Supreme Court Pursuant To 28 U.S.C. § 1254(2). 4/29 (Panel) -ot-
May 04	Filed Memorandum In Opposition To In- tervenors-Aples' Objection To Bill of Costs of Plaintiff-Aplt's. -ot-
May 6	Recv'd lrt dated April 27, from T. S. Hong, re: substitution of Michael Lilly for Yukio Naito, and lead counsel is profes- sor Tribe. sz
May 09	Filed Aplt's Memorandum Opposing Joint Application To Stay The Mandate. 5/6 (Panel) -ot-

- May 17 Filed Order (Alarcon, Ferguson, Poole, CJJ) The motion to make exhibits one through forty part of the record is denied. Judges Alarcon and Poole have voted to deny the application to stay issuance of the mandate pending appeal to the U.S. Supreme Court. Judge Ferguson has voted to grant the stay of mandate. The application to stay mandate pending appeal is denied. ogm
- June 8 Filed Orig & 33 Appellees' (Tom, et al.,) notice of withdrawal of Joint motion to withdraw petition for rehearing and suggestion for rehearing en banc with letter dated 6/7/83. (Panel) 6/7 ogm
- June 13 Received on June 3, 1983 appearance of counsel of Richard J. Archer, for Intervenor/Appellees. (pw)
- June 15 Filed Intervenor-Aples' Notice of Withdrawal of Joint Motion To Withdraw Petition For Rehearing And Suggestion of Appropriateness of Rehearing En Banc. 6/15 (Panel) -ot-
- June 17 Filed Order (ALARCON, FERGUSON, POOLE, CJJ) The Petition for rehearing is denied and the suggestion for rehearing en banc is rejected. The joint motion to withdraw the petition for rehearing and suggestion for rehearing en banc is dismissed as moot. The several notices of withdrawal of the above joint motion are dismissed as moot. ogm

May 2	Filed Memorandum in Opposition to Hawaii's Objection to Bill of Costs of Plaintiffs-Appls'. 4/28. -ot-
May 2	Filed Joinder in Objection to Bill of Costs of Bishop Estate. 4/28. -ot-
May 2	Filed (Inter/Aple Halawa Vly) Joinder in Objection to Bill of Costs of Bishop Estate. 4/29 -ot-
May 2	Filed aplt's (Trustees of the Kamehameha Schools/Bishop Estate) Memorandum in opposition for order lodging exhibits one through forty. (4/29) (Panel) sz
May 3	Filed Joint Motion to Withdraw Petition for Rehearing and Suggestion for Rehearing En Banc and an Application to Stay the Mandate Pending an Appeal to the United States Supreme Court Pursuant to 28 U.S.C. § 1254(2). 4/29 (Panel) -ot-
May 4	Filed Memorandum in Opposition to Intervenor-Aples' Objection to Bill of Costs of Plaintiff-Appls. -ot-
May 6	Recv'd ltr dated April 27, from T. S. Hong, re: substitution of Michael Lilly for Yukio Naito, and lead counsel is Professor Tribe. sz
May 9	Filed Appls' Memorandum Opposing Joint Application to Stay the Mandate, 5/6 (Panel) -ot-

- May 17 Filed Order (Alarcon, Ferguson, Poole, CJJ) The motion to make exhibits one through forty part of the record is denied. Judges Alarcon and Poole have voted to deny the application to stay issuance of the mandate pending appeal to the U.S. Supreme Court. Judge Ferguson has voted to grant the stay of mandate. The application to stay mandate pending appeal is denied. ogm
- June 8 Filed Orig & 33 Appellees' (Tom, et al.,) notice of withdrawal of Joint motion to withdraw petition for rehearing and suggestion for rehearing en banc with letter dated 6/7/83. (Panel) 6/7 ogm
- June 13 Received on June 3, 1983 appearance of counsel of Richard J. Archer, for Intervenor/Appellees. (pw)
- June 15 Filed Intervenor-Aples' Notice of Withdrawal of Joint Motion to Withdraw Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc. 6/15 (Panel) -ot-
- June 17 Filed Order (Alarcon, Ferguson, Poole, CJJ) The Petition for rehearing is denied and the suggestion for rehearing en banc is rejected. The joint motion to withdraw the petition for rehearing and suggestion for rehearing en banc is dismissed as moot. The several notices of withdrawal of the above joint motion are dismissed as moot. ogm
- June 27 Mandate Issued.

June 27	Filed Motion for Award of Plaintiffs-Appellants' Attys' fees or for Remand with Directions to Ward Fees. 6/24 (CIVATT) -ot-
July 11	Filed Joint Defendants-Appellees' and Intervenor-Appellees' objection to Plaintiff-Appellants' Application for Attorneys' Fees and Memorandum of Points and Authorities in Support of Objections. 7/8 (CIVATT) -ot-
July 11	Filed Intervenor-Appellees' [Kahala Community, Etc., Et Al.] Opposition to Plaintiffs-Appellants' Motion for Award of Attys' Fees. 7/8 (CIVATT) -ot-
July 13	Filed Aplts' Reply Memorandum in Support of Plaintiffs-Appellants' Motion for Award of Attys' Fees. 7/12 (CIVATT) -ot-
July 15	Rec'd Intervenor-Apples' Notice of Appeal to the Supreme Court of the United States. 7/14 -ot-
July 15	Rec'd Apples' Notice of Appeal to SC. 7/14 -ot-

Appendix K

In the Circuit Court of the First Circuit
State of Hawaii

Civil No. 47103

Frank E. Midkiff, et al.,
Plaintiffs,

vs.

Ronald Y. Amemiya,
Attorney General of the State of Hawaii, et al.,
Defendants.

[Filed June 29, 1978]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs are Trustees of the Estate of Bernice Pauahi Bishop and have filed this Complaint for Declaratory Judgment and for Instructions on December 29, 1975.

The Hawaii Housing Authority is named as defendant and the Director of the Department of Social Services and Housing, the Commissioners of the Hawaii Housing Authority, the Executive Director of the Hawaii Housing Authority, and the Special Assistant for Housing are all named as defendants because of their connection with the Hawaii Housing Authority.

The Attorney General is named as a defendant because he is authorized to represent the interests of the public in matters concerning the administration of trust estates established for charitable and educational purposes, including the Estate of Bernice Pauahi Bishop (hereinafter referred to as the "Bishop Estate").

The remaining defendants are lessees of certain residential lots owned and developed by the Trustees in Tract "A", Waialae Neighborhood Subdivision, Waialae-Nui, in

the City and County of Honolulu, State of Hawaii (hereinafter referred to as "Tract A"), or their vendees under Agreements of Sale.

The Trustees have issued leases to the lessees in the Tract A subdivision which have a term of 55 years which commenced on January 1, 1951. The annual lease rent was fixed for an initial 25 year period and is to be renegotiated for the final 30 year period. The initial fixed rent period under these leases ended on December 31, 1975, and the defendants-lessees had not renegotiated their annual rent with the Trustees prior to that date.

Act 185, 1975 Session Laws of Hawaii (hereinafter referred to as "Act 185"), establishes guidelines and places certain limitations on the rent which can be charged by the Trustees on renegotiation and names the Hawaii Housing Authority or its designee as arbitrator in the event the parties cannot agree on the annual rent. In their Complaint, the Trustees have asked this Court to enter a declaratory judgment that Act 185 is unconstitutional as applied to these leases and for instructions as to their responsibilities with respect to the determination of the annual lease rent for the final 30 year period of these leases.

This case came on for trial before the Court on July 18 through July 22 and July 25 through July 28, 1977, and the Court having considered all of the stipulations, testimony, exhibits and other evidence received at the trial of this matter and all of the legal memoranda of counsel, including the proposed findings of fact and conclusions of law submitted by counsel, and the transcripts of the trial, hereby makes the following findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiffs have failed to meet their burden of disproving the legislative findings and purposes in Section 1, Act 185, Session Laws of Hawaii 1975.

2. The Court reaffirms the legislative findings and purposes in Section 1, Act 307, Session Laws of Hawaii 1967 and Act 185.

3. In Act 307, the legislature found that:

(a) A prime goal in the United States is the promotion of public welfare and the securing of liberty as enunciated in the Constitution of the United States through the attainment of fee simple ownership of residential lots by the greatest number of people. Article I, section 2 of the State Constitution recognizes this goal when it states:

'All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property . . .'

(b) During the past few years, Hawaii's economy has expanded greatly and its population has grown rapidly. Concomitantly, the demand for single-family residential lots, especially in the urban areas of the State where the population growth has been concentrated, has increased sharply.

(c) The present-day land ownership system in the State is characterized by a concentration of the fee title to lands in the hands of a few. In the days of the Hawaiian monarchy, all of the lands were held by the Hawaiian kings and chiefs and a few of their faithful followers. While the concentration of ownership of land in the hands of a few may have been well-suited to the needs of the people in the days of the monarchy, it is hardly suited to the needs of the people in modern Hawaii. Yet, the pattern of concentration of land ownership in the hands of a few has remained essentially unchanged since the days of the monarchy. Today, land ownership is centered not in the mon-

archical government, but in the hands of a few estates, trusts and other private landowners. At least three-fourths of all privately held land in the State are currently owned by this small group of owners. Much of this land is in the rapidly developing urban areas of the State, where the need for single-family residential lots is critical.

(d) This critical shortage of land has led large landowners to enter into complex arrangements, such as development contracts, master leases, participating leases, subleases and leases with developers. The terms and conditions of these arrangements were at that time heavily weighted in favor of the lessors or fee owners against the developers and those who participated in the development or share in the lease rentals. Neither did the participants in the private arrangements or contracts or leases contemplate, at that time, the wholesale condemnation of private leased residential lots by the State as provided in this act.

(e) The few landowners have, over the years, permitted some of their urban lands to be developed into single-family residential lots. However, because of restrictive indentures in instruments creating the various trusts and estates, and because of income taxation problems, the landowners have generally engaged in the practice of leasing, rather than selling in fee simple, the residential lots developed on their lands.

(f) The population growth and the increase in demand for residential lots, and the concentration of ownership of private lands in the hands of a few and their practice of leasing, rather than selling in fee simple, the residential lots developed on their lands, have led to a serious shortage of residential fee simple property at reasonable prices in the State's urban areas and have deprived the people of the State of a

choice to own or to take leases to the land on which their homes are situated.

(g) The shortage of single-family, residential, fee simple property, and the restriction on the people of a real choice between fee simple and leasehold residential property have in turn caused land prices for both fee simple and leasehold residential lots to become artificially inflated and have enabled lessors to include in residential leases terms and conditions that are financially disadvantageous to the lessees, restrict unduly their freedom to enjoy their leasehold estates and are weighted heavily in favor of the landlord as against lessees.

(h) In the next twenty years, it appears that the few, large landowners will continue to permit the development of leasehold, rather than fee simple, residential lots in counties exceeding 100,000 persons in population, unless legislation is enacted to reverse this trend.

(i) Even when the provisions providing for purchase of the fee simple title of residential lots by lessees or the State as provided in this act become effective, neither the lessees nor the State can possibly acquire all leasehold lands. Thus, many of the over 16,000 leasehold contracts now in existence and future leases will remain outstanding, and the economic facts stated above indicate clearly that lessees require certain statutory protection of their fundamental rights to bargain and to otherwise preserve their equitable and legal interests.

(j) The dispersion of ownership of fee simple residential lots to as large a number of people as possible, the ability of the people to acquire fee simple ownership of residential lots at a fair and reasonable price and the ability of lessees of residential leases to derive full enjoyment from their leaseholds are factors which

vitality affect the economy of the State and the public interest, health, welfare, security and happiness.

4. In Act 185, the legislature found that:

The home is the basic source of shelter and security in society, the center of our society which provides the basis for the development of our future citizens. Deprivation through exorbitant and unreasonable prices of this basic need results in frustrations and unrest in our community that is harmful to the overall fiber of our society.

Although Act 307 was enacted in 1967 the fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 percent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 percent of all land.

Along with this concentrated ownership of land there exists in the State of Hawaii a critical shortage of housing units for all income levels. There will be a need for over 250,000 low and middle income units by 1985 and a need will exist for all types of units. Since 1961 the economy has been producing an average of less than 10,000 low and middle income units annually. The economy has similarly lagged in the production of all other units, except the very high priced.

The small number of private landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long term residential leases. While fee simple ownership still accounted for 68.9 percent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 percent of all owner-occupied housing units developed on Oahu had been

leasehold. Between 1967-1972, 46 percent of such development has been on leaseholds.

The foregoing developments have compelled thousands of people in the State to resort to leasehold residences to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

The predictions of Act 307 as to effects of the residential leasehold system have proven to be conservative. Today, there are over 26,000 outstanding residential leases, an increase of more than 10,000, since Act 307 was enacted. As stated in Act 307, the concentration of land ownership 'is in the rapidly developing urban areas of the State, where the need for single family residential lots is critical'.

Initially, lease rents were low or were within the range which the public could afford. However, in the renegotiation of rents that have occurred in recent years, tremendous increases in lease rents have been imposed upon countless lessees by lessors. The compensation provided to be paid to lessors under Act 307 was directly related to the present value of the lease income stream generated under the lease to be condemned. Since June 24, 1967 lessors have generally adopted a practice of increasing lease rentals on renegotiations of existing leases in a manner unrelated to the raw land value, thereby greatly increasing the cost to the lessee when exercising his rights under Act 307 and resulting further in unconscionably increasing lease rents.

Renegotiation has brought about staggering increases in annual lease rentals. These increases have been the direct result of inflated land values which in turn have come about because of the supply of urban land for residential housing under the concentrated ownership described in the findings contained in Act 307. The effect of these increases has been to substantially increase the cost of

leasing housing for the people of Hawaii. The increases in lease rentals and premiums required prior to leasing of residential property has accentuated the problem stated in section 1(g) of Act 307 to the effect that the continuation of the residential leasehold system causes an artificial inflation in the price of fee simple residential property, as well as leasehold residential property.

Further, because of the unequal bargaining power between large landowners and individual lessees there have been breakdowns in the normal processes of bargaining and freedom of contract, resulting in unjust, unreasonable and oppressive lease rents being exacted by lessors. Thus the limited supply of housing units and concentrated ownership of such units have led to the exaction of exorbitant lease rents on renegotiation. In many instances, the lessor's terms are peremptorily submitted to the lessee in ultimatum form through letters rather than through any actual bargaining process.

This unequal bargaining relationship exists today despite the rights granted lessees under Part III of Act 307 which was passed some seven years ago. Accordingly the adverse and harmful effects sought to be alleviated by that Act have not been stemmed, but to the contrary have become more critical.

In addition the inequality of bargaining power due to the oligopolistic imbalance in land ownership has allowed the lessor to charge lease rents based not only on the raw land value of the property but also on improvements which have already been paid for by the lessee and on the value accruing thereon; thus the lessee is, in effect, paying the lessor for an investment made by the lessee. This is an unjust enrichment created by an oligopolistic market lacking competitive bargaining and is contrary to the public welfare.

Inasmuch as the free market cannot correct this situation because of the lack of competition, inherent in an oligopolistic market, it is necessary for the public good and welfare that the imbalance be redressed.

Residential leaseholds have had and continue to have undesirable economic effects. The high prices commanded for leasehold units have encouraged the development of leasehold residential units and have discouraged the development of fee simple units. The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) as much as 1000 percent; renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated. These new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages. Rental renegotiations have strongly favored the lessor, with the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold, although the lease may yet have 25 or more years to run. The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g., a house appraised at \$68,000 before renegotiation of lease rent has been appraised at \$59,000 after the lease rental was increased), causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

Residential leaseholds have had undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who

has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase other housing. These situations have grave effects on the health, welfare, and well-being of elderly persons and aggravate the already acute need for government-sponsored, low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future.

The legislature declares that it is the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms; that the public health, safety and welfare of the people of Hawaii demand that legislation be enacted to prevent the imposition of confiscatory economic burdens upon the lessees of residential property; that pursuant to and based upon the findings stated, above, the public health, safety and welfare is severely and substantially affected and threatened, resulting in immediate, continuous, and irreparable harm and that all the conditions and circumstances set forth herein constitute a social emergency which it is the purpose of this act to prevent and remedy.

I. PARTIES

5. Plaintiffs Trustees are all residents of the City and County of Honolulu, State of Hawaii, and are the Trustees under the Will and of the Estate of Bernice Pauahi Bishop, Deceased, a trust estate created for charitable and educational purposes.

6. Defendant Ronald Y. Amemiya is the Attorney General of the State of Hawaii and in his official capacity, he is authorized to represent the interest of the public in matters concerning the administration of trust estates established for charitable and educational purposes, including the Bishop Estate.

7. Defendant the Hawaii Housing Authority is a public body corporate and politic with perpetual existence organized and existing under the laws of the State of Hawaii.

8. Defendants Alan B. Kidwell, Paul A. Tom, Walter E. Whitcomb, Tony Taniguchi, B. Martin Luna and Nobuyoshi Tamura are the six public commissioners of the Hawaii Housing Authority.

9. Defendant David C. Slipher is the Special Assistant for Housing appointed by the Governor of the State of Hawaii and is also an ex officio additional voting commissioner of the Hawaii Housing Authority.

10. Defendant Andrew I. T. Chang is the Director of the Department of Social Services and Housing, State of Hawaii, and is the official having administrative control over the Hawaii Housing Authority, and is an ex officio additional voting commissioner of the Hawaii Housing Authority.

11. Defendant Franklin Y. K. Sunn is the Executive Director of the Hawaii Housing Authority.

12. The remaining individual defendants are each lessees of a residential lot or lots owned by the Trustees and located in Tract A, or are vendees under Agreements of Sale of the lessee's interest in a residential lot or lots owned by the Trustees and located in Tract A, and are all residents of the City and County of Honolulu, State of Hawaii.

II. BISHOP ESTATE

13. The Bishop Estate with the Kamehameha Schools as its sole beneficiaries is deemed a tax-exempt educational trust by the United States Internal Revenue Service. The income derived by Bishop Estate from its substantial landholdings and other investments is not subject to income tax. Except for expenses incurred in administering

the Estate, the income is available to operate and maintain the Kamehameha Schools.

14. As of June 30, 1975, approximately 342,000 acres remain as part of the corpus of the trust. These lands are located on five islands as follows:

	<u>Acres</u>	<u>Percent</u>
Oahu	56,581	16.53
Maui	4,695	1.37
Molokai	2,541	.74
Hawaii	266,716	77.93
Kauai	11,726	3.43
	<u>342,259</u>	<u>100.00</u>

15. As of June 30, 1975, in terms of land use classification, the land holdings are held in the following uses:

	<u>Acres</u>	<u>Percent</u>
Residential	5,521	1.61
Commercial	978	.29
Unimproved Urban	3,059	.89
Agricultural	166,147	48.55
Conservation	166,554	48.66
	<u>342,259</u>	<u>100.00</u>

16. As of June 30, 1975, in terms of land use classification, the land holdings are held in the following uses by island:

<u>OAHU</u>	<u>Acres</u>	<u>Percent</u>
Residential	5,159.9	9.12
Unimproved Residential	2,381.5	4.21
Commercial	188.9	.33
Hotel, Apartment and Resort	446.9	.79
Industrial	221.2	.39
Agricultural	16,641.4	29.41
Conservation	31,541.5	55.75
	<u>56,581.3</u>	<u>100.00</u>

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<u>HAWAII</u>	<u>Acres</u>	<u>Percent</u>
Commercial	12.8	—
Hotel, Apartment and Resort	88.1	.03
Industrial	17.8	—
Residential	357.4	.14
Agricultural	144,037.2	54.01
Conservation	121,539.1	45.57
Unimproved Residential	663.1	.25
	<u>266,715.5</u>	<u>100.00</u>
<u>MAUI</u>		
Hotel, Apartment and Resort	3.1	.12
Industrial	1.7	.07
Agricultural	1,220.3	48.02
Conservation	1,302.0	51.24
Unimproved Residential	13.9	.55
	<u>2,540.9</u>	<u>100.00</u>
<u>MOLOKAI</u>		
Residential	1.1	.03
Agricultural	3,134.4	66.76
Conservation	1,559.4	33.21
Unimproved Residential	—	—
	<u>4,694.9</u>	<u>100.00</u>
<u>KAUAI</u>		
Agricultural	1,113.4	9.50
Conservation	10,612.1	90.50
	<u>11,725.5</u>	<u>100.00</u>

17. About 2 percent of the total land holdings (in acres) produce 80 percent of the gross revenues of the Bishop Estate and the remaining 98 percent produce 13 percent of the gross revenues. About 7 percent of gross revenues is produced from other sources.

18. Residential leases provide 33 percent of the gross revenues, and industrial, commercial and hotel apartment leases, combined, produce 47 percent of the gross revenues.

19. Bishop Estate is the largest private owner of land on Oahu and its position has remained relatively unchanged over the past 16 years because it has sold very little land in fee simple.

20. Bishop Estate has not provided any land for single-family residential fee simple subdivisions on Oahu from 1950 up to the time of the trial of this action.

21. There are in excess of 17,800 leases covering single-family residential properties owned by Bishop Estate.

22. From 1950 to 1975, 14,408 leasehold single-family residential lots were developed on land owned by Bishop Estate.

23. From 1950 to 1959, a total of 1,468 leasehold single-family residential lots were developed on Bishop Estate land, or an average of approximately 147 leasehold lots per year. A total of 7,579 leasehold single-family residential lots were developed from 1960 to 1969, an average of 758 lots per year. 5,361 leasehold lots were developed from 1970 to 1975, an average of 893 lots per year.

24. During the 1950's, Bishop Estate leasehold land accounted for approximately 4.6% of the newly developed single-family housing units on Oahu, 40% during the 1960's, and 50% of such development from 1970 to 1975.

25. From 1961 to 1974, most of the single-family housing units developed in the urban corridor of Honolulu, an area extending from the Diamond Head side of Pearl Harbor to Koko Head, were developed on land leased from Bishop Estate.

26. At a meeting held in March 16, 1967, the Trustees voted to approve a statement "that the Trustees, in principle, support legislation to increase fee simple ownership of lands and to assure fair treatment of lessees."

27. From 1967 to 1975, Bishop Estate did not sell any substantial number of its existing leasehold single-family residential properties in fee to its lessees or to anyone else.

28. From 1967 to 1975, the purposes of Act 307 as they related to Bishop Estate were not attained. Bishop Estate lessees were generally not able to acquire the fee interest in their residential lots and the development of new leasehold subdivisions on Bishop Estate land was actually accelerated and, as a result, new single-family housing in the suburbs around Honolulu generally became even more predominantly leasehold.

29. To maintain its tax exempt status, Bishop Estate has sought and has never been denied approval of the Internal Revenue Service to sell land in fee simple and Bishop Estate has recently requested and has been granted permission by the Internal Revenue Service to sell single-family residential properties in fee simple.

30. In 1968, the Bishop Estate staff stated in a report to the Trustees that if condemnation actions under Act 307 were initiated, it would be important for Bishop Estate to have the highest possible lease rents in effect.

31. Rental policy for Bishop Estate leaseholds is established by the Trustees. The Trustees can unilaterally change its policy regarding rent renegotiation at any time.

32. Lease rents on extensions or renegotiations are quoted by the Bishop Estate staff in accordance with existing Trustee policy or by direction from the Trustees. Edwin Michatel, the Bishop Estate area development manager responsible for residential leaseholds in the Waialae-Maunaloa-Koolaupoko areas could recall only one instance in his five years as manager where the lessee disputed the quoted lease rent on renegotiation and there was an actual give and take negotiation between the lessee and the Trustees.

33. Initial lease rents in new subdivisions on Bishop Estate lands are based on "marketability" and other factors and not on the formulas set by the Trustee to quote rents for extension or renegotiation.

34. In May 1960, when no significant lot development charge was paid by its lessee, the Trustees adopted a policy for quoting rents for lease extension or renegotiation at 3% of the full market value of the improved lot with no credit to the lessee for offsite improvements or lot development costs actually paid for by the lessee.

35. Offsite improvements and lot development costs paid by the lessee can be twice as much as the value of the unimproved land and in some land fill situations, the Trustees' actual equity in the improved lot may be as low as 10%.

36. A chart attached to the Bishop Estate staff report dated January 23, 1968, graphically demonstrates the advantage of having the lessee pay for offsite improvements and lot development costs where the Trustees were able to charge rents based on the investment by the lessee in offsite improvements and lot development costs and the appreciation in the value of those items.

37. In 1962, the Trustees adopted a policy giving lessees credit for 75% of the remaining fixed rent when they extend or renegotiate their lease rent early. The Bishop Estate staff considers granting of lessee's rental credit an important stimulant to frequent renegotiation of lease rent. Since renegotiation is the most significant factor in increasing revenue for the Trustees, the Bishop Estate staff pointed out to the Trustees that it was important that Bishop Estate's policy encourage early renegotiation of rent.

38. On October 5, 1965, the Trustees for the first time adopted a policy of giving the lessee some credit for offsite

improvements and lot development costs by giving him credit for the original cost of such improvements amortized over 55 years.

39. Offsite improvements generally do not actually depreciate over time because their replacement cost increases and because they are maintained in a relatively depreciation-free condition by government maintenance which is paid for in part by property taxes which are paid by the lessee.

40. In 1968, the Bishop Estate began studying its residential leasehold policy for the primary purpose of increasing Bishop Estate income. In a staff report dated September 19, 1968, the Bishop Estate staff recommended that the lease rents quoted for lease extension or renegotiation be increased from 3% to 3.6% or to a maximum of 4% and concluded that major changes in the lease rent policy of a major landowner like Bishop Estate could have serious consequences on the state's economy and that rental increases to more than 4% would be likely to disrupt property values and arouse public indignation.

41. In response to these staff recommendations, the Trustees voted at a meeting held on September 24, 1968 to increase the lease rent rate to be quoted on lease extension or renegotiation from 3% to 4.28% for 30 year fixed rent leases.

42. In 1969, the Trustees commissioned reports from independent consultants regarding its residential leasehold rent policy. Economic Research Associates (hereinafter referred to as "ERA"), a mainland company, submitted a report to the Trustees dated September 10, 1969, which recommended that lessees be given credit at the time of renegotiation for a proportionate share of appreciation based upon the initial ratio of offsite improvements and lot development costs of unimproved lot value at the inception of the lease and that the initial market value of the

raw land be used as a base for setting lease rents throughout the duration of the lease.

43. In 1969, Gilbert Root, a local appraiser who testified at the trial, was retained by Bishop Estate to advise the Trustees in connection with a review of their residential leasing policy. He strongly recommended the so-called "Irvine Ranch formula" which allocates the current value of the leasehold land based on the proportion of the offsite improvements and lot development costs actually paid by for by the lessee and the value of the unimproved land provided by the lessor. Mr. Root told the Trustees that their investment in residential leaseholds would result in a 9% composite yield, assuming a 30 year fixed rent period, a 5% annual rate of appreciation in value of the improved lot, and annual rental set at 4% of the basis computed using the Irvine Ranch formula. Mr. Root admitted on cross-examination that over a period of time, the owner's basis definition contained in Act 185 and the Irvine Ranch formula would yield about the same results.

44. The Bishop Estate staff objected to Mr. Root's formula because they thought it would require a double appraisal of the property.

45. In a staff report dated March 12, 1970, the Bishop Estate staff stated that the 4.28% return adopted in 1968 was a rather arbitrary figure and recommended to the Trustees that it be rounded down to 4% or up to 4.5%.

46. In that report dated March 12, 1970, the Bishop Estate staff, after careful consideration, developed an alternative which would give the lessee full credit for lot development costs paid for by him, plus 2% appreciation per year on the cost of those improvements as a compromise between credit for the full original cost of lot development costs and the Irvine Ranch formula. They also recommended a 100% rental credit for the remaining fixed rent on leases with a 30 year fixed rent period. In consideration of these two credits to the lessee, the Bishop

Estate staff recommended that the annual lease rental rate be rounded up to 4.5%.

47. Later in 1970, the Bishop Estate staff recommended that the annual lease rental rate be rounded down to 4% because it still exceeded the "true interest rate" of 3% in excess of inflation which would be expected on a secure investment and because the effects of inflation on residential leasehold would be counterbalanced in favor of the Trustees by appreciation in the leasehold land that occurs in practically all leasehold property.

48. On January 5, 1971, the Trustees rejected the staff recommendations that the lessee be given credit for the cost of offsite improvements and lot development costs paid for by him with appreciation at 2% per year and 100% rental credit for the remaining fixed term, but went ahead and increased the annual lease rental rate from 4.28% to 4.5%. The 4.5% rental rate was still the annual rental rate in effect under the Trustees' current policy at the time of trial.

49. From February 24, 1972, up to the time of trial, the Trustees' policy on renegotiation has been to give the lessee credit at original cost for offsite improvements paid for by the lessee with no appreciation.

50. On July 24, 1973, the Trustees adopted a new policy for lease extensions which provided for a new term of 55 years with rental fixed for the first 25 years and annual rents based on a 4% rate for the first 15 years with a 50% stepup for the following 10 years with the provision that rent for the next 10 years shall not exceed the rent for the fifteenth year of the new lease term increased in the same proportion as any net increases in the Honolulu Consumer Price Index over the 15 year period.

51. On July 24, 1973, the Trustees adopted a policy requiring lessees to pay \$50 to obtain a firm commitment from Bishop Estate stating the new rent offered for extension of their lease. The quotations did not require any

actual appraisals except in exceptional cases and were simply based on computations using a multiplier of tax assessed values. The lessees had to pay the \$50 in advance even if they did not accept the rent quoted by Bishop Estate.

52. Beginning in 1973, the Bishop Estate staff recommended a number of policy changes designed to alleviate the hardship to lessees caused by increased lease rents. One such recommendation was to quote rent at a 3% rate initially, with a 50% stepup after 15 years where the lessee was not interested in a 55 year extension. The Trustees deferred action on these various recommendations and none were ever adopted.

53. The Trustees adopted a policy on June 3, 1975, giving the lessee a 100% rental credit for remaining fixed rent to encourage early extension and rent renegotiation.

54. In a Bishop Estate staff report dated August 12, 1975, the staff evaluated the potential effects of Act 185 which had been passed by the legislature and concluded that for the next 8 years or so, Act 185 would have little effect on the new rent to be quoted for the first 15 years since the essential difference between current practice and that prescribed by Act 185 is a relative credit allowed for development cost paid by the lessee. Accordingly, the staff recommended that Bishop Estate go ahead and quote rent at 4% of owner's basis as defined in Act 185 with the condition that if an extension is subsequently requested and granted, there would be no rental credit given to the lessee.

55. Although the Trustees ostensibly adopted this recommendation of the staff to follow Act 185 on August 12, 1975, the rent offered for renegotiation in the letters sent to the Tract A residents was computed in accordance with the Trustee policy established on January 5, 1971, and without regard to Act 185.

56. The alternative for extension to a new 55 year lease was offered in accordance with Trustee Policy L 413 except that the Honolulu Consumer Price Index ceiling was deleted.

57. On May 6, 1976, the Trustees suspended all quotation of rents for requested extensions in Waialae-Kahala and cancelled all overdue, outstanding offers for residential lease extensions and maintained this policy up to the time of trial.

III. TRACT A

58. Tract A is a single-family residential subdivision located adjacent to the Kahala Mall Shopping Center in Waialae-Kahala. Waialae-Kahala is a suburban neighborhood which is primarily single-family residential located just east of Diamond Head and in relatively close commuting proximity to downtown Honolulu.

59. Waialae-Kahala is situated in what is sometimes called the urban corridor of Honolulu.

60. Archibald C. Camp and his wife, Margaret, were original purchasers in Tract A and their lease is attached as an exhibit to the Complaint in this case.

61. Prior to the development of Tract A, there was only one road through the area, and the land was used for growing vegetables and raising chickens and pigs.

62. Before moving to Tract A, Mr. Camp owned a fee simple lot in Manoa and had plans drawn for a house, but could not get financing to build the house because Honolulu financial institutions didn't have enough money for such financing. Financing for homes in Tract A was pre-arranged through Prudential Insurance Company on the mainland and there appeared to be a heavy demand for property with this type of financing.

63. Each lot in Tract A was prepackaged with a house following one of several designs which had been assigned to that lot.

64. The Camp house was constructed on a concrete slab laid on a pad bulldozed out of the coral head. It was single wall construction of Grade C fir and contained two bedrooms and one bath and cost \$12,500. Included with Mr. Camp's house was \$50 worth of landscaping. Mr. and Mrs. Camp also paid an additional lot development charge of \$850.

65. The Camp lease which is dated January 1, 1951, provided for an annual rental of \$116 per year for the first 18 years and \$260 per year for the next 7 years with rent to be renegotiated at the end of the initial 25 year fixed term which expired on December 31, 1975. The other leases in Tract A bore similar dates, contained identical terms and provided, on the average, for a rental of \$120 per year for the first 18 years of the lease and \$269 per year for the next 7 years of the lease with rent to be renegotiated at the end of the initial 25 year fixed rent period at "such annual rent as shall be mutually agreed upon by the Lessors and the Lessee. . . ."

66. The Tract A leases provided as follows with respect to rent renegotiation in the event of failure to reach an agreement:

That in the event the Lessors and the Lessee shall fail to reach an agreement before the end of the twenty-fifth (25th) year of said term in the matter of the annual rental payable hereunder for and during the last thirty (30) years of said term, then and in such case the annual rental shall be the fair and reasonable annual rental of the land hereby demised (exclusive of buildings) as shall be determined by three arbitrators, who shall be recognized real estate appraisers, one to be appointed by each of the parties hereto, and

either party may give to the other written notice of a desire to have an arbitration of the matter and name therein one of the arbitrators, whereupon the other party shall within ten (10) days after the receipt of such notice, name another arbitrator and give notice thereof to the party seeking arbitration, and, in case of failure so to do, the party who has named an arbitrator shall have the right to apply to the person then sitting as the senior judge in service of the Circuit Court of the First Judicial Circuit, requesting him to appoint an arbitrator, and the two arbitrators thus appointed (in either manner) shall select and appoint a third arbitrator and give notice thereof to the Lessors and Lessee, and in the event that the two arbitrators so appointed shall, within ten (10) days after the naming of the second arbitrator, fail to appoint the third arbitrator, either party shall have the right to apply to such judge to appoint such third arbitrator, and the three arbitrators so appointed shall thereupon proceed to determine the matter in question, and the decision of any two of them shall be final, conclusive and binding upon both parties and judgment may be entered upon such award by the Circuit Court of the First Circuit unless the same shall be vacated, modified or corrected as provided in Chapter 165, Revised Laws of Hawaii 1945, or as the same may be amended or reenacted from time to time, the provisions of which said statute shall apply hereto as fully as though incorporated herein; provided, however, that in the event two of the above three arbitrators shall fail to reach an agreement in the determination of the matter in question, the matter in question shall be decided by three new arbitrators, who shall likewise be recognized real estate appraisers, and who shall be appointed in the same manner aforesaid, and this process shall be repeated until a decision is finally reached by two of the arbitrators; and provided,

further, that the parties hereto shall each pay for the services of its own appointee and one half of all other legitimate costs of said arbitration, other than attorneys' fees and witness fees;

67. The Tract A leases did not specify the method by which lease rent after the expiration of the initial fixed rent period of 25 years was to be computed, but provided only that the annual rental was to be "the fair and annual rental of the land."

68. The Tract A leases provided in paragraph two, that the lessee was to pay all taxes and assessments on the property:

2. PAYMENT OF TAXES, ASSESSMENTS, ETC. That he will also pay, when and as the same become due and payable, all taxes, rates, assessments, charges and other outgoings of every description to which the demised premises, or the Lessors or Lessee in respect thereof, are now or may during said term be assessed or become liable; provided, however, that with respect to any assessment made under any betterment or improvement law which may be payable in installments, the Lessee shall be required to pay only such installments as shall become due and payable during the term of this lease together with a like number of installments of interest each in an amount computed by determining the total interest payable during the term hereof with respect to such assessment and dividing said total interest payable by the number of installments of principal to be paid on said assessment by the Lessee hereunder;

69. The Tract A improvement district assessed each individual lot to pay for a pro rata portion of the offsite improvements for the entire subdivision. Under the Tract A leases, the lessee was responsible for the payment of these improvement district assessments, although the lessor

did reduce the amount of annual rent covering the payment period of the improvement district assessment by the amount of annual installments payable on the assessment.

70. Prudential Insurance Company collected the taxes, insurance and other charges due on the property on a monthly basis and the monthly bill dated November 27, 1951 for the Camp property shows lease rent of \$9.67 per month and an improvement district assessment of \$12.00 per month.

71. On December 24, 1975, Bishop Estate sent separate rent renegotiation offer letters to 42 lessees in Tract A which stated that each had until January 15, 1976, within which to respond to the offer. However, the Trustees filed the Complaint on December 29, 1975, naming as Defendants the 40 Tract A lessees and vendees under Agreements of Sale who had not accepted the rental terms offered in the letters.

72. In the letters, the Trustees offered to fix the rent for the remaining 30 years of the lease at an amount equal to $4\frac{1}{2}\%$ of the present value of the "Trustees' interest." The Trustees' interest is the unencumbered fee value of the lot less the \$850 lot development cost paid by the original lessees. The average annual rent offered to lessees for the remaining 30 years was \$2,943, which is in the top 4% of all lease rents on the island of Oahu.

73. The median age of the defendant Tract A lessees based on a survey with a response rate of over 50% is 62 years of age.

74. The rent offered by Bishop Estate to Mr. and Mrs. Camp would increase their annual lease rent from \$260 to \$2,709 for their two-bedroom, one bath home. Mr. Camp testified that he thought a renegotiated lease rent of about \$1,000 per year would give Bishop Estate a fair return on its original investment in the land.

75. The rent offered by Bishop Estate to Yuji and Naka Miyamoto would increase their annual lease rent from \$260 to \$2,551 for the remaining 30 years of their lease. Mr. and Mrs. Miyamoto are both 77 years old. Mr. Miyamoto testified that he could not afford the high lease rent offered by Bishop Estate on his retirement pay and Social Security. He would be willing to pay an annual rent equal to four times his previous rent of \$260 per year. Mr. Miyamoto has planned to make the house his permanent home. He and his wife have planted a number of trees and flowers which they enjoy tending. They don't want to move.

76. The rent offered by Bishop Estate to Carl and Emma Miller would increase their lease rent from \$260 to \$2,525 a year for the remaining 30 years of their lease. Mrs. Miller is 81 years old. Her husband, who is 82 years old, is blind in one eye and does not have much sight in his other eye. Mrs. Miller testified that she and her husband cannot afford the lease rent offered by Bishop Estate on their limited retirement income and Social Security. They still care for their yard by themselves and have planned to live in their Tract A home permanently. She thinks a lease rent of \$600 to \$800 per year for their two bedroom, one bath house with a carport would be fair.

77. The rent offered by Bishop Estate to Sakae Komenaka, a widow, would increase her annual lease rent from \$260 to \$2,667. Mrs. Komenaka is retired because of a heart condition for which she has a pacemaker. She rents the main portion of her home, consisting of a two bedroom, one bath house for \$350 per month and lives in an expanded recreation room in back of the carport. She rents the house because she needs the income to make ends meet. If she had to pay the rent offered by Bishop Estate, most of the rent she receives for her house would be spent on lease rent. She testified that a lease rent of \$50 per month would

be a reasonable return to Bishop Estate and an amount which she could afford to pay out of her retirement income and Social Security payments. She bought her home with the intention of living there the rest of her life.

78. The lease rent offered by Bishop Estate to Philip and Jane Bankhardt would increase their annual lease rent from \$290 to \$3,207. Mr. Bankhardt is 66 years old and his wife is 60. He retired from the Honolulu Chamber of Commerce in 1975 and his wife does not work. Although he does not want to move, the lease rent of \$265 per month offered by Bishop Estate amounts to an eviction. He has improved the property by planting flowers and fruit trees. He feels that lease rent of \$800 per year for their three bedroom, two bath home would give Bishop Estate a good return.

79. The mean family income in the Waialae-Kahala census area which includes Waialae-Iki, Black Point, Diamond Head and the Beach front section of Kahala is \$25,590 per year and the median family income is \$26,583.

80. The average lease rent of \$2,943 per year offered by Bishop Estate to the Tract A lessees would be a hardship for two-thirds of the families in the Waialae-Kahala census area. The defendants-lessees in Tract A generally have less income than the median and mean family incomes for the Waialae-Kahala census area.

81. Older people tend to live in the same home longer than younger people. Approximately 24% of the older people in Hawaii in 1973 had been living in their present home for 25 years or more and almost 60% of older people had lived in their present home for at least 10 years.

82. Older people become strongly attached to their home if they have lived there a long time and the home plays a larger role in older people's sense of psychological, economic and social independence.

83. Moving is a difficult and stressful event for older people especially if they have lived in their home for a considerable period of time or if they have health problems.

84. Where the lessees have lived in an existing subdivision for a long period of time, the rents demanded on renegotiation may not be related to the lessees' ability to pay.

85. As people get older, their incomes decline. Income is the most important problem for older people in Hawaii. On Oahu, 58% of people over 60 have an income of less than \$4,000 and 27% have an income of between \$4,000 and \$7,000. The income of people over 65 is approximately 44% to 66% of the income of people in the 60-64 age group.

86. A tenfold increase in lease rent from approximately \$250 per year to \$2,500 per year would cause a dilemma for most older people who may be on fixed incomes and who do not have the economic assets to pay such an increase. The economic impact of such an increase would be substantial and would either require the lessee to reduce expenditures for food, recreation and clothing or would require him to move.

87. The lease rents offered by Bishop Estate to the Tract A lessees would cause considerable hardship for a substantial number of them.

88. The Trustees adopted a general leasing policy applying to all Bishop Estate lease negotiations, effective February, 1972, which stated that in the establishment of leasing policies, the financial capability of the prospective lessee was one of the primary factors to be considered. The lease rents demanded by Bishop Estate from the Tract A lessees are beyond the financial capabilities of a substantial number of the Tract A Lessees. ✓

IV. HOUSING AND LAND OWNERSHIP

89. Residential properties on the neighbor islands of Kauai, Maui and Hawaii, even though available, are not viable substitutes for residential properties on Oahu because of the distance, travel time and travel expenses between Oahu and these neighbor islands. An abundance of residential land on the neighbor islands will not help to alleviate the single-family residential shortage in Honolulu.

90. The fee simple ownership of land on the island of Oahu is concentrated in the hands of a relatively small number of landowners.

91. The United States, the State of Hawaii, and the City and County of Honolulu combined own 31.5% of Oahu's land, or 117,956 acres.

92. There are 12 major private landowners on Oahu, each owning more than 1% of the land on Oahu (hereinafter referred to as "major landowners").

93. Together, governmental and major landowners control 85% of the total land area of Oahu.

94. The major landowners own 53.5% of the land on Oahu, or 199,808 acres.

95. The major landowners own approximately 78.1% of all the privately held land on Oahu.

96. The three major landowners with the largest shares of land on Oahu own 58.4% of all the privately held land on Oahu, or 39.9% of the total land area of Oahu.

97. The Bishop Estate, with 22.1% of the privately owned land on the island of Oahu, or 15.1% of the total land area, has the largest private landholdings on Oahu.

98. Since the late 1940's, the major landowners, with the exception of Castle & Cooke, have made their land

available for single-family housing in leasehold rather than in fee simple. The large landowners which chose to create residential leaseholds tailored their leases to fit the Federal Housing Administration (hereinafter referred to as "FHA") requirement that leases have a total remaining term of 50 years. By contrast, small landowners on Oahu have sold their land in fee simple for residential development.

99. Use of long-term residential leaseholds became widespread on Oahu because of the parallel practices adopted by the major landowners.

100. During the period from 1951 to 1976, the economy, population and civilian employment in the State of Hawaii increased dramatically. This growth was largely confined to the island of Oahu while the growth patterns of the neighbor islands were relatively flat.

101. Since 1950, the supply of single-family residential housing in fee simple has fallen far short of the demand especially in the areas adjacent to Honolulu.

102. As the suburbs developed around the urban core of Honolulu where the land is largely owned in fee simple, the expansion of small fee owners was limited by large tracts of land around Honolulu owned by the major landowners in the following areas (1) east from Kaimuki to Koko Head, (2) west toward Pearl Harbor, and (3) north to Kaneohe and Kailua.

103. The major landowners which owned the large tracts of land surrounding Honolulu controlled the availability of land and generally chose to follow the parallel practices of making their land available for single-family housing in leasehold rather than in fee simple.

104. From 1961 to 1974, the percentage of total single-family residential houses on leased land on Oahu increased from approximately 16% to approximately 34%, while the

percentage of total single-family residential houses on fee land declined from approximately 84% in 1961 to approximately 66% in 1974. These figures indicate that from 1961 to 1974 an increasingly greater proportion of Oahu's single-family housing demands were supplied on leasehold land.

105. The following areas of Oahu are ranked below in the general order of their desirability for single-family residential purposes:

- (1) Kaimuki to Koko Head
- (2) Windward
- (3) Central Leeward
- (4) Rural

106. In the Kaimuki to Koko Head area where Tract A is located, approximately 5,854 single-family housing units were developed on tracts including 25 or more units from 1961 to 1974, and approximately 93% or 5,434 of those units were developed on leasehold land while approximately 7% or 420 were developed on fee land.

107. In the Waialae-Kahala-Koko Head area, the Bishop Estate owns about 824 of the approximately 975 acres of vacant land zoned for single-family residential use.

108. From 1961 to 1974, 6,041 single-family housing units were developed in Windward Oahu on tracts including 25 or more units and approximately two-thirds of those were on leasehold property while only one-third were developed on fee property.

109. In the windward Oahu area of Kaneohe and Kailua, four major landowners and the federal and state governments hold a substantial portion of the 1,334 acres of vacant single-family residential land in that area. The Bishop Estate owns 350 acres plus a portion of an addi-

tional 647 acres of the vacant land zoned for single-family residential use in the Kaneohe and Kailua area.

110. From 1961 to 1974, there were in excess of 14,000 single-family housing units developed on tracts including 25 or more units in Central Leeward Oahu, which is the area from Pearl Harbor to Ewa and Mililani, and approximately one-third of those units were developed on leasehold land while two-thirds were developed on land sold in fee. The relatively large proportion of single-family housing units developed in fee in the Central Leeward area reflect the decision of Castle & Cooke to sell its Central Leeward property in fee simple instead of following the leasehold practices of the other major landowners.

111. In the area from Pearl Harbor to Mililani, six major landowners and the federal government hold a substantial portion of the 583 acres of the land zoned for single-family residential use that is vacant in that area.

112. In suburban Honolulu, which includes the Kaimuki to Koko Head area, the Central Leeward area and the Kailua-Kaneohe area, Bishop Estate owns approximately 40% of the vacant land zoned for single-family residential use and part of another 22% of such acreage.

113. Forty-six percent of the vacant land on Oahu zoned for single-family residential use is located in rural Oahu where the demand for such land is relatively weak or nonexistent. The reason single-family buyers are not willing to buy land in outlying areas such as Waianae and Kaena Point involves complex sociological problems, but the net result is that people have chosen to live in suburbs which are adjacent to the urban core of Honolulu.

114. At the present time, there is a shortage of single-family housing on Oahu and an even greater shortage of fee simple single-family housing in the suburban areas where such housing is demanded.

115. The housing vacancy rate from 1950 to 1973 has generally been less than 3%. This figure includes vacancies throughout Hawaii and on Oahu for both houses and apartments. Such a vacancy rate indicates a tight market. A vacancy rate in excess of 10% would be indicative of a highly competitive market.

116. The difference between the value of fee simple properties and leasehold properties has been reduced as a result of the housing shortage on Oahu to the point that there is only a 10% difference in the price between fee simple properties and comparable leasehold properties.

117. Overly restrictive residential zoning has not caused the shortage of single-family housing on Oahu. The existence of vacant land in rural and urban areas, already zoned for residential use, will not alleviate the shortage, because the development practices of the major landowners control the availability of land for housing.

118. Statistics regarding the concentration of land owned by major landowners and the size and location of the tracts owned by major landowners indicate that the single-family housing market in the urban corridor can be described as "quasi-monopolistic."

119. Statistics regarding the concentration of ownership of land adjacent to the central core of Honolulu and the parallel practice of major landowners, with the exception of Castle & Cooke, to develop properties in leasehold and the dominance of leasehold development over fee simple development in these areas indicate that the single-family residential housing market in that area is oligopolistic.

120. There has been an oversupply of condominiums on Oahu since 1975 and the oversupply is expected to last into the immediate future.

V. MORTGAGE FINANCING REQUIREMENTS

121. Since the late 1940's, long-term residential leasehold provisions have been tailored to satisfy FHA requirements.

122. Initially, the FHA required that the term of residential leases be more than 50 years and that the lease rent be specified for a period at least five years beyond the amortization of the loan.

123. Currently, the FHA will not insure a single-family residential leasehold mortgage unless 50 years are remaining under the lease and the amortization term is equal to or less than the remaining fixed rent period of the lease.

124. Presently, the Veterans Administration loan guaranty program has the same requirements as the FHA Mortgage Insurance Program except that the Veterans Administration will permit the amortization period to extend within 14 years of final termination of the lease.

125. The Federal National Mortgage Association will not buy mortgage loans unless the full term of a residential lease extends at least ten years beyond the amortization period and that amortization period cannot extend more than five years beyond the fixed rent period.

126. For uninsured conventional loans for single-family leasehold residences, Bank of Hawaii requires that the total term of the lease extend at least ten years beyond the amortization period of the loan and that the lease rent be fixed for at least ten years.

127. Savings and loan associations in Honolulu generally require a residential lease to extend ten years beyond the amortization period of the loan and have at least ten years of fixed rent remaining under the lease. Territorial Savings and Loan Association restricts the amortization period of its residential leasehold mortgage loans to double the fixed rent period. First Federal Savings and Loan Association restricts the amortization terms

of residential leasehold loans to ten years more than the fixed rent period under the lease.

128. The frequency with which lease rent renegotiations occur because of lessee financing requirements is estimated to be a minimum of one to two times during the first 30 years of a lease and at least three times during the 55 year lease term.

129. Lenders in Honolulu generally require that a residential loan applicant's housing costs, consisting of principal, interest, taxes, insurance and lease rent, not exceed 25% of his monthly income. As a result, any increase in a residential loan applicant's lease rent will decrease the amount of money available for the applicant's other housing-related expenses such as principal, interest, taxes, and insurance. For instance, where an applicant's lease rent is \$20 per month, he needs \$80 per month of income to qualify for a loan to cover the lease rent portion of his housing costs. If his lease rent is increased to \$200 per month, he must have \$800 per month of income to qualify for a loan to cover the lease rent portion of his housing costs and must earn \$720 more per month to qualify for a loan in the same amount. If a lessee's lease rent is increased by a substantial amount, he might be unable to qualify for mortgage.

130. A mortgage institution is disturbed if the initial ratio between a borrower's (1) principal and interest payments and other home expenses and (2) income is affected because of a substantial increase in lease rent.

131. The lessor's right to receive rent payments under the lease has priority over the mortgage lender's right to receive mortgage payments.

132. If a lessee fails to make his mortgage payments and his lease payments, the mortgage lender would be required to make the lease payments on behalf of the

lessee in order to preserve its mortgage on the leasehold estate. The position of the lessor is more secure than the position of the mortgage lender.

VI. HAWAII'S ECONOMY

133. The demand for real estate is basically a demand for space. The demand for urban real estate is influenced by many factors—the demand for residential housing is related to increases in population, the level of income, the liberality of mortgage terms, the level of employment, income distribution and family total income, proportion of housing rented or owned, demographic data including ages of population and general distribution of population among age groups, family size, and other factors.

134. Total personal income in Hawaii for the period 1951 through 1976 increased from a total well under a billion dollars to something in excess of six billion dollars. Except for the period 1951 through 1956, Hawaii's rate of growth exceeded that of the nation as a whole.

135. Total real personal income in Hawaii for the period 1951 through 1976 measured in 1967 dollars increased at a lesser rate than total personal income measured in current dollars. The trend line shows three distinct periods in the rate of growth; namely, 1951 to 1958, 1958 to 1973, and 1973 to the present. For the first period 1951 to 1958, the trend line is flat; for the second period 1958 to 1973, the line is relatively steep in the upward direction; and then for the period 1973 to 1976, the line is again flat.

136. Civilian employment in Hawaii during the period 1951 through 1976 experienced a rate of growth similar to that experienced in the Total Real Personal Income category and the pattern of growth shown by a trend line is also similar. The growth, however, occurred mainly on the Island of Oahu. The neighbor island counties experi-

enced a decline during the period 1951 through 1961 and then a slight increase since 1961.

137. Total resident population in Hawaii during the period 1951 through 1976 experienced a rate of growth similar to that experienced in civilian employment and the personal income categories, except that there is no slackening of the trend line between 1972 and 1976.

138. Economic activity as measured by private bank deposits, value of construction, retail sales, during the period 1951 through 1976, increased in dramatic proportions in current dollars.

139. Price inflation as measured by the Honolulu Consumer Price Index for the period 1951 through 1976 was in the magnitude of 129.3 percent. During the period 1951 to 1956, inflation set in at the rate of 1 percent; from 1956 to 1961, a more rapid increase in prices occurred; from 1961 to 1966, at approximately the same rate of increase as in the previous 5 years; from 1966 to 1971, a considerable jump in the rate of increase of about 22 percent; and then from 1971 to 1976, the most dramatic increase of about 37 percent were experienced.

140. Federal government civilian employment, construction employment, diversified manufacturing employment, transportation communications and utilities employment, hotel employment, other services employment, finance, insurance, and real estate employment, wholesale and retail trade employment, State and County government employment, for the years 1951 through 1976, all show substantial increases although in varying degrees.

141. In the seven years between 1968 and 1975, 65 percent of all the hotel rooms totalling some 43,000 units today was built; about 50 percent of all the office space was built; and practically every high rise building in Makiki and Waikiki was built. The construction industry

employed 8 percent of the total labor force at a time when the national average was 4 percent. The value of construction put in place during the period was about 20 percent of total personal income, when the national average was about 10 percent.

142. The future of sugar is bleak. Even with price supports at the announced goal of $13\frac{1}{2}$ cents or \$270 per ton, the average cost of production of \$263 per ton leaves very little to cover the marginal operations which are below the average. About one-third to one-half of the sugar industry is likely to be lost over a period of time. The impact would be felt mainly on the neighbor islands, although Oahu will not be immune from such effects.

143. The pineapple industry is stabilized. There is no reasonable prospect of growth. During the last 15 years, the pineapple industry shrank from 9 companies to 3 companies and from 75,000 acres in cultivation to 40,000 acres.

144. The military is not expected to be a growth industry for Hawaii. Increases in expenditures in recent years has not exceeded the rate of inflation. The nature of military expenditures is such that it is not susceptible to prediction with reasonable accuracy.

145. Tourism will continue to grow not at the rate experienced percentage-wise over the last 20 years but in absolute terms. Such growth in tourism would not produce the growth in the total economy as experienced in the last 20 years but only half the rate. Moreover, most of the growth will be on the neighbor islands. In 1960, of the total number of hotel rooms in the State, 85 percent were located on Oahu and 15 percent on the neighbor islands. The ratio is likely to change further with the neighbor islands increasing their share.

VII. THE OWNER'S BASIS DEFINITION IN ACT 185

146. Act 185 limits the maximum annual rent which a lessor may charge a lessee upon renegotiation of the lease rent terms of a residential lease contract to 4% of owner's basis.

147. Act 185 provides that lease rent renegotiations under Act 185 "shall not be scheduled more frequently than once every 15 years, provided the first of such reopenings shall not be scheduled prior to the fifteenth year following the initial date of the lease."

148. The provision of Act 185 quoted in paragraph 147 above does not affect or conflict with the provisions of the Tract A leases which specify the rent for the first 25 years of the lease and provide for negotiation of the rental terms for the remaining 30 years of the lease and, therefore, is not at issue in this case.

149. The owner's basis definition in Act 185 apportions the current fair market value of the unencumbered fee lot, excluding onsite improvements, between the lessor and the lessee.

150. Owner's basis is defined in Act 185 as follows:

[C]urrent fair market value of the lot, excluding onsite improvements, valued as if the fee title were unencumbered, less the lessee's share, if any, of the current replacement cost of providing existing offsite improvements, attributable to the land, which replacement cost shall include an overhead and profit not exceeding 20% of the current replacement cost of the existing offsite improvements, or less the original lot development credit to the lessee, whichever is greater. (Section 519-2(a)(2) H.R.S., as amended)

151. Act 185 defines offsite improvements as follows:

[A]ll physical improvements such as, but not limited to, roads, sewer lines, sewage treatment plants, and

underground utility cables, constructed or placed in a subdivision or development off the land intended for occupancy, which improvements are to be used in common by occupants of all lands adjoining such improvements or by occupants of all lands for whose benefit the improvements have been constructed or placed; . . . (Act 185, § 2)

152. Act 185 defines onsite improvements as follows:

[A]ll physical improvements placed on a residential lot intended for occupancy which improvements are for the benefit of occupants of that lot, including, but not limited to, dwelling units, garages, service buildings, stairs, walkways, driveways, walls, trees, shrubs, landscaping, and pools. (Act 185, § 2)

153. The owner's basis definition is not particularly difficult to apply and could be applied by appraisers in practice.

154. The owner's basis definition in Act 185 provides a practical, reasonable method for allocating the current value of the improved leasehold lot between the lessor and lessee for the purpose of rent renegotiation.

VIII. RENTS AND RATE OF RETURN UNDER ACT 185

155. The rate of return to Bishop Estate on the Tract A leases should be measured by the composite yield which includes both current lease rent and appreciation in the value of the underlying leased fee interest owned by Bishop Estate.

156. A lot improvement cost in the amount of \$850 was charged to each of the original lessees in Tract A by Bishop Estate.

157. The offsite improvements for Tract A were paid for through an improvement district. A cost of 21.160507

cents per square foot was assessed against each Tract A lot and the costs assessed against each lot have been paid off over time by the lessees pursuant to the terms of their leases.

158. The improvement district cost of \$1,951.48 assessed against the Camp lot, which contains 9,222 square feet, was billed to Mr. and Mrs. Camp. A lot development charge of \$850 was also paid by Mr. and Mrs. Camp. Bishop Estate's initial investment in the Camp lot was \$4,150. The rent under the Camp lease was set at \$116 for the first 18 years and at \$260 for the next 7 years.

159. Appraisers in the City and County of Honolulu generally estimate that residential land in developed neighborhoods will appreciate at an average rate of approximately 5% per year. An annual rate of appreciation of 5% is considerably lower than the appreciation which has occurred in Tract A in the past 15 years. A rate of appreciation of 5% a year is a reasonable estimate of appreciation in residential land in the future.

160. The annual rent allowed under the provisions of Act 185 for the Camp lease would be approximately \$1,903, which would provide Bishop Estate with a current annual rate of return on its initial investment of approximately 45.9% over the remaining 30 years of the lease without recognizing appreciation or an average composite yield of approximately 9.5% over the full 55 year term of the lease with appreciation taken into account.

161. The average size of the lots leased by the Tract A defendants-lessees is 9,587 square feet and the average improvement district cost per lot was about \$2,028.66. The lot improvement cost paid for each Tract A lot was \$850 per lot. The average annual rent for the Tract A defendants-lessees for the first 18 years was \$120 and for the next 7 years it was \$269. Bishop Estate's average initial investment in these Tract A lots was \$4,314.

162. The annual rent allowed under the provisions of Act 185 for the average lot in Tract A would be approximately \$1,940, which would provide Bishop Estate with a current annual rate of return on its initial investment of approximately 45.0% over the remaining 30 years of the lease without recognizing appreciation or an average composite yield of approximately 9.5% over the full 55 year term of the lease with appreciation taken into account.

163. The Bishop Estate staff estimates that on the average its residential lessees will renew or extend their leases after only 15 years of the initial fixed rent period of their leases have elapsed. Bishop Estate's estimate with respect to the frequency of such renewals or extensions is supported by the testimony of Wesley Hillendahl, an economist with the Bank of Hawaii, who stated that the typical property in Hawaii turns over about every 8 years. Stanley Baird, a Vice President of Bank of Hawaii and manager of Bank of Hawaii's Residential Mortgage Loan Administration also testified that the average life of a residential loan in Hawaii is less than 10 years.

164. Renewals and extensions of leases result in the early renegotiation of lease rent. Bishop Estate expects much higher rents from its residential leases which have been renewed or extended than from the original rents provided for in the leases.

165. Bishop Estate did not prove what costs and expenses, if any, were attributable to management and administration of its residential leaseholds.

IX. EVALUATION OF THE RATE OF RETURN ALLOWED UNDER ACT 185

A. *Compared with the formulas recommended by ERA.*

166. In its 1969 study of Bishop Estate's residential leasehold policies, ERA recommended two formulas for computing the amount of annual rent to charge Bishop Estate lessees. The annual rent on the Camp lot of approximately \$1,831 under both ERA formulas is less than the annual rent of approximately \$1,903 allowed under Act 185.

B. Compared with Consumer Price Index.

167. Between 1951 and 1975, the Honolulu Consumer Price Index which reflects the increase in costs and expenses of a blue collar metropolitan family of four has risen by a factor of approximately 2.34, and using this factor on the present annual rent of \$260 charged on the Camp lease and the present average rent for the 40 leases, both rentals would be increased to \$608 and \$630, respectively.

C. Compared with median income of families.

168. Median family income has increased by a factor of slightly over 4 between 1950 and 1974. It is an indicator of a family's general ability to pay for various goods and services including housing. If the lease rent for a lot in Tract A was \$250 in 1950, the lease rent for the same lot in 1974, increased in accordance with median family income, would be approximately \$1,038.

D. Compared with per capita personal income.

169. Per capita personal income measures the purchasing power of an individual person and has increased at about the same rate as median family income. Per capita personal income is one of the ways to measure an individual's general ability to pay for various goods and services including housing. Based on the increase in per capita personal income, lease rent of \$250 in 1950 should be increased to approximately \$1,030 in 1974.

170. Per capita disposable personal income, which is per capita personal income less taxes, is a better measure of a person's purchasing power than per capita personal income. Per capita disposable income has risen somewhat less than per capita personal income between 1951 and 1975 because during that period taxes have increased. Average taxes have risen from about 25% in the 1950's to about 33% now, so the lease rent based on the increase in per capita disposable personal income would be somewhat less than the annual lease rent based on per capita personal income.

E. Compared with increase in the shelter rent index.

171. The shelter rent index is a measure of the median rents for a particular period of time and is based on the actual rents people are paying for housing. It is a composite figure, including single-family and multiple-unit housing. Between 1951 and 1975, the shelter rent index has increased by a factor of approximately 5.06. If the increase in the shelter rent index were used to increase the average rent for Tract A and the Camp lease rent, the rents would be approximately \$1,361 and \$1,316, respectively.

F. Compared with rents in Waialae—Iki IV.

172. Homes in the leasehold development known as the Waialae-Iki View Lots—Unit IV (hereinafter referred to as "Unit IV"), which are located on Bishop Estate land, were sold during 1975. Unit IV, which is located near Tract A, is a more desirable location than Tract A because it has better homes, a better view and is a higher quality development than Tract A. Purchasers of homes in Unit IV have also invested more money in their homes.

173. The difference in value of homes in Tract A and Unit IV is indicated by a comparison of the median and average sales prices of recent sales in those developments. The median price of a home purchased in Tract A between 1976 and 1977 was \$81,500, while the corresponding figure for Unit IV was \$163,000. The average price of a home in Tract A between 1976 and 1977 was \$83,560 compared to the average of \$149,440 of a Unit IV home.

174. The average lease rent in Unit IV is \$1,320 for the first 30 years of the lease based on rent of \$1,100 a year for the first 15 years and \$1,650 per year for the next 15 years. The Unit IV rents are the highest lease rents charged by Bishop Estate for any of its new subdivisions. Only beachfront lot rents are higher.

175. The rent demanded by Bishop Estate for its Unit IV lots is presumably in balance with the income of Unit IV's homeowners because the residents of Unit IV would not have been able to obtain financing if the lease rent demanded from them was not proportionate to their total income.

176. The residents of Tract A have been asked by the Trustees to pay more than twice as much rent for Tract A lots which are worth considerably less than the Unit IV lots.

G. Compared with Lessees' testimony regarding their ability to pay.

177. The mean lease rent for Tract A of approximately \$2,943 annually offered by Bishop Estate would be a hardship for at least two-thirds of the homeowners in the Waialae-Kahala area and would be a hardship for an even greater proportion of the Tract A defendants.

H. Compared with the rate of return on bonds.

178. As of July 22, 1977, the yield on several different types of bonds was as follows:

	<u>Yield (%)</u>
U.S. Government Bonds (Maturity 1986)	7.22
U.S. Government Bonds (Maturity 2000)	7.60
Industrial Bonds (30 year AAA)	7.95
Corporate Bonds (10 year AAA)	7.30
Utility Bonds (30 year AAA)	8.10

179. There is really no investment in bonds which is as good as Bishop Estate's investment in residential leasehold because bonds do not have the built-in hedge against inflation that Bishop Estate's residential leasehold investment provides.

180. Bishop Estate should be willing to accept a lower yield on its real estate investment than it might expect if it were to invest in bonds.

I. Land is secure and stable investment.

181. No investment has provided a more stable and secure investment and more appreciation over the last 15 years than an investment in land.

182. The increase in the value of the land has more than compensated for any inflationary impact on lease rents.

183. Residential leasehold land provides a more than adequate hedge against inflation. If inflation increased at a rate greater than the 5% straight-line appreciation per year forecast by witnesses in the trial, Bishop Estate would be compensated for any increased inflation by an increase in the appreciation of its land.

184. Bishop Estate's residential leasehold land is a highly marketable and liquid asset.

J. A fair rate of return.

185. Act 185 allows Bishop Estate a fair, just and reasonable return on its Tract A residential leasehold. A rate of return somewhat lower than the 4% of owner's basis provided for in Act 185 would still provide Bishop Estate with a fair and reasonable return on its residential leasehold land.

186. Generally, a composite yield of between 6% and 7% would provide Bishop Estate with a fair, just and reasonable return on its investment in residential leasehold.

X. ARBITRATION PROVISIONS OF ACT 185

187. The arbitration provision in Act 185 provides as follows:

In the event the parties to a lease are unable to achieve an agreement under any reopening provision, the Hawaii Housing Authority or its designee shall arbitrate, and its findings shall be binding and conclusive on both parties. (Section 519-2(b) H.R.S., as amended)

188. Act 185 limits the use of arbitration to lease rent renegotiation.

189. Act 185 requires that the Hawaii Housing Authority or its designee, rather than a three-member arbitration panel, arbitrate any lease rent renegotiation disputes between Bishop Estate and the Tract A lessees.

190. One of the concerns of the Hawaii Legislature in promulgating Act 185 was to provide an expeditious method of resolving disputes regarding residential lease rent renegotiation. Standing Committee Report No. 752 of the Senate Committee on Housing and Hawaiian Homes of the 1975 Legislative Session stated in relevant part:

In the event that the lessor and lessee are unable to reach agreement during renegotiation, the Hawaii housing authority or its designee is directed to arbitrate. Your Committee has determined that, in order to further redress the unconscionable imbalance in bargaining between lessors and lessees on residential leaseholds and to effectuate the foregoing, it is necessary to provide for an expeditious manner of settling disputes during renegotiation.

191. No procedures for implementation of the provision have been established by the Hawaii Housing Authority.

192. Neither the Bishop Estate nor the Tract A lessees have requested that the Hawaii Housing Authority arbitrate their lease rental disputes.

193. The Hawaii Housing Authority is a properly formed state agency and the plaintiffs have not proven that the Hawaii Housing Authority cannot properly and fairly discharge its duties under Act 185.

194. The remainder of Act 185 could be applied and implemented even if the arbitration provision contained in Section 2(b) were deleted from the Act.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of this case and the parties.

2. An actual controversy exists between the parties regarding the interpretation and constitutionality of Act 185, 1975 Session Laws of Hawaii, codified in Section 519-2, Hawaii Revised Statutes, as amended. Section 2 of Act 185 provides as follows:

(a) [A]ll leases, as defined by Section 516-1(5), of residential lots, as defined by Section 516-1(11), existing on June 2, 1975, or entered into thereafter, which provide for reopening of the contract for renegotiation of lease rent terms shall in the case of leases after June 2, 1975, provide the following, or in the case of leases existing on June 2, 1975, shall be construed in conformity with the following:

(1) Such renegotiation shall not be scheduled more frequently than once every fifteen years, provided the first of such reopenings shall not be scheduled prior to the fifteenth year following the initial date of the lease; and

(2) Upon renegotiation, the lease rent payable shall not exceed the amount derived by multiplying the "owner's basis" by 4%. For purposes of this section, "owner's basis" means the current fair market value of the lot, excluding onsite improvements, valued as if the fee title were unencumbered; less the lessee's share, if any, of the current replacement cost of providing existing offsite improvements attributable to the land, which replacement cost shall include an overhead and profit not exceeding twenty per cent of the current replacement cost of the existing offsite improvements, or less the original lot development credit to the lessee, whichever is greater. For purposes of this section, "offsite improvements"

means all physical improvements such as, but not limited to, roads, sewer lines, sewage treatment plants, and underground utility cables, constructed or placed in a subdivision or development off the land intended for occupancy, which improvements are to be used in common by occupants of all lands adjoining such improvements or by occupants of all lands for whose benefit the improvements have been constructed or placed; and "onsite improvements" means all physical improvements placed on a residential lot intended for occupancy which improvements are for the benefit of occupants of that lot, including, but not limited to, dwelling units, garages, service buildings, stairs, walkways, driveways, walls, trees, shrubs, landscaping, and pools.

(b) In the event the parties to a lease are unable to achieve an agreement under any reopening provision, the Hawaii housing authority or its designee shall arbitrate, and its findings shall be binding and conclusive on both parties.

(c) Any covenant or provision of a lease in violation of this section, shall not be enforceable in any court in this State.

(d) For the purpose of this section renegotiation shall not include negotiation for the determination of lease rental under section 516-66 arising out of an extension under section 516-65.

Section 3 of Act 185 contains a standard severability provision which provides as follows:

If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the validity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

3. The plaintiffs as Trustees of the single largest lessor of residential property in the State of Hawaii and the defendants-lessees have a concrete interest in the interpretation and constitutionality of Act 185 because the initial 25 year fixed rent period under the leases between the Trustees and the defendants-lessees expired on December 31, 1975, and the annual lease rent for the final 30 years of the lease terms commencing on January 1, 1976, has not yet been renegotiated and the renegotiation of the annual rent under these leases is covered by the provisions of Act 185.

4. The Hawaii Housing Authority, its Director, its Commissioners and the Director of the Department of Social Services and Housing also have a concrete interest in the constitutionality of Act 185 because the Hawaii Housing Authority is named as arbitrator under that Act.

5. The Attorney General of the State of Hawaii has a concrete interest in the constitutionality of Act 185 because he represents the interests of the public in matters concerning administration of trusts established for charitable and educational purposes including the Bishop Estate.

6. A declaratory judgment in this action will serve to terminate the controversy among the parties regarding the constitutionality of Act 185 and the Court's instructions to the Trustees will serve to avoid further controversy between the Trustees or other similar residential lessors and their lessees regarding the renegotiation of rent under residential leases covered by Act 185. Therefore, the Court has jurisdiction to render a declaratory judgment pursuant to Section 632-1, Hawaii Revised Statutes, and Rule 57, Hawaii Rules of Civil Procedure. *See Dalton v. City and County of Honolulu*, 51 Haw. 400 (1969).

7. Section 2(a)(1) of Act 185 provides that lease rent renegotiations under reopening provisions in leases covered by Act 185 shall not be scheduled more frequently than

once every fifteen years. The Trustees allege that this provision requires that the rent be fixed for an unreasonably long period of time and makes this provision of Act 185 unconstitutional. The Tract A form of lease at issue in this case fixes the rent for an initial period of 25 years and then for the remaining 30 years at an amount to be renegotiated between the parties. Since the rent is fixed on renegotiation for the remaining 30 years of the lease, the fifteen-year limitation provision in Act 185 has no effect on this lease and the Trustees cannot challenge it here.

[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other situations in which its application might be unconstitutional. *United States v. Rains*, 362 U.S. 17, 21, 4 L.Ed. 2d 524, 80 S. Ct. 519 (1960).

Therefore, the Court declines to rule on the constitutionality of that provision. However, the evidence presented in this case indicates that the renegotiation of rent under long-term residential leases presents potential problems and expenses for both the lessor and the lessee and that financial institutions in Hawaii often require fixed rent periods of at least 10 years as a condition for mortgage financing. Consequently, it appears that fixed rent periods shorter than 15 years may impose an unreasonable hardship on the residential lessee and severely restrict his ability to resell his property to buyers requiring mortgage financing.

8. Section 2(b) of Act 185 provides that in the event the parties fail to agree on the amount of rent under a reopening provision, the Hawaii Housing Authority or its designee shall act as arbitrator and that its findings shall be "binding and conclusive" on both parties.

9. The Trustees allege that this arbitration provision is "compulsory" and unconstitutional because it deprives

them of their right to jury trial and violates their right to procedural due process because it requires all disputes under the lease to be resolved by arbitration without any appeal to the judicial system. The lease already contains an arbitration clause which requires arbitration in the event that the parties fail to agree on the annual rental on reopening and provides that the decision of the arbitrators shall be "final, conclusive and binding upon both parties" unless vacated, modified or corrected as provided in Chapter 165, Revised Laws of Hawaii 1945. Chapter 165, Revised Laws of Hawaii 1945 is now Chapter 658, Hawaii Revised Statutes, as amended. Chapter 658 provides that arbitration awards may be vacated, modified or corrected by the Court under certain circumstances.

10. It is axiomatic that this Court must interpret the arbitration provision of Act 185, if at all possible, to make it constitutional. *Pan American Airways Co. v. Godbold*, 36 Haw. 170, 182 (1942). Accordingly, the Court construes the arbitration provision in Act 185 as being limited in its application to the renegotiation of rent on reopening in the event the parties fail to agree on the annual rental which is already covered by the compulsory arbitration clause in the lease. Under this construction, the arbitration function to be performed by the Hawaii Housing Authority under Act 185 is identical to the function to be performed by the arbitration panel provided for in the lease.

11. The provisions of Chapter 658, Hawaii Revised Statutes, apply to the Tract A leases as though incorporated therein. Act 185 contains no provision limiting the right of the parties to appeal the arbitration decision as provided for in the lease. Therefore, the decision of the Hawaii Housing Authority as arbitrator under Act 185 is subject to the same right of appeal as provided for in the lease and may be vacated, modified or corrected as provided for in Chapter 658. The only change made by Act 185 in the lease arbitration clause is the substitution of the

Hawaii Housing Authority for the panel of three real estate appraisers.

12. In the alternative, if the Supreme Court of Hawaii holds that Chapter 658 of the Hawaii Revised Statutes is inapplicable, the Court finds that a decision of the Hawaii Housing Authority as arbitrator under Act 185 is subject to judicial review as provided for in the Hawaii Administrative Procedure Act, Chapter 91, Hawaii Revised Statutes. *Aguilar v. HHA*, 53 Haw. 478 (1974).

13. The arbitration provision of Act 185 does not deny the Trustees their right to procedural due process and does not deny them their right to judicial review or jury trial.

14. The Trustees allege that Act 185 is an unconstitutional impairment of the Trustees' lease contract in violation of Article 1, Section 10 of the United States Constitution. The Trustees have exaggerated the potential effect of Act 185 on their lease. The Tract A lease provides that the rent on renegotiation "shall be mutually agreed upon by the lessors and the lessee" and that in the event they "fail to reach an agreement, then . . . the annual rent shall be the fair and reasonable rental of the land demised (exclusive of buildings) as shall be determined by three arbitrators, who shall be recognized real estate appraisers . . ." The provisions of Act 185 do not contradict the lease with respect to the amount of rent to be set on renegotiation since the lease does not specify how the "fair and reasonable annual rental of the land" is to be computed. Act 185 does provide guidelines and a maximum limit on the annual rental and substitutes the Hawaii Housing Authority as arbitrator in place of the panel of three real estate appraisers as discussed above. As the Trustees concede in their answering brief, it is now well settled that private contracts are subject to legitimate exercise of the police power without any unconstitutional impairment of contract. *Home Building and Loan Association v. Blaisdell*,

290 U.S. 398 (1934); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945); *Stone v. Mississippi*, 101 U.S. 814 (1879).

15. The Trustees also allege that Act 185 takes the Trustees' property without just compensation in violation of Section 1 of the Fourteenth Amendment incorporating the Fifth Amendment to the United States Constitution. Regulatory legislation like Act 185 may severely reduce the value of property or greatly restrict the earnings from property as a valid exercise of the police power without any unconstitutional "taking" of property without compensation. *South Terminal Corp. v. E.P.A.*, 504 F. 2d 646 (1st Cir. 1974); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 60 L. Ed. 348, 354, (1915).

16. The Trustees also allege that Act 185 denies the Trustees substantive due process in violation of Section 1 of the Fourteenth Amendment to the United States Constitution. The standard of judicial review for determining whether Act 185 is a valid legislative exercise of the police power or an unconstitutional impairment of contract or "taking" without just compensation is the same as the standard for determining whether there has been a violation of substantive due process: All three constitutional challenges prohibit only legislation that is arbitrary, capricious and not reasonably related to a proper legislative purpose. See *Nebbia v. New York*, 291 U.S. 502, at 539 (1934); *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1962); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

17. Trustees' argument that Act 185 applies retroactively and denies due process through curtailment of their "vested rights" is without merit. Act 185 is a reasonable exercise of the police power and serves a strong pub-

lic interest and does not curtail Trustees' use or enjoyment of their rights.

18. There is no special requirement of an economic emergency or social emergency in order to justify the rent limitation provision contained in Act 185. *See, e.g., Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 130 Cal. Rptr. 465, 483-487 (1976); *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 350 A. 2d 1 (1975); *Eisen v. Eastman*, 421 F. 2d 560 (2nd cir. 1969); *cf. Olsen v. Nebraska*, 313 U.S. 236, 245, 85 L. Ed. 1305, 1309, 61 S. Ct. 862 (1941); and *Nebbia v. New York*, 291 U.S. 502, 78 L. Ed. 940, 54 S. Ct. 505 (1934). The State of Hawaii is beset by numerous complex and varied social and economic problems. The legislature is not required by either the United States Constitution or the Hawaii Constitution to abstain from dealing with these problems until they reach crisis proportions. The legislature must be given enough latitude to enact legislation which deals rationally with problems of varying degrees of severity which are of legitimate public concern.

19. Act 185 is presumed to be a valid exercise of the legislative power and the legislative findings contained in Section 1 of Act 185 are presumed to be true. *In re Mott-Smith*, 29 Haw. 346 (1926); *Koike v. Board of Water Supply*, 44 Haw. 100, at 103-104, 352 P. 2d 835, at 838 (1960); *Territory v. Akase*, 43 Haw. 84, at 88 (1958); *Hawaii Housing Authority v. Schnack*, 39 Haw. 543 (1952); *Bishop of Mahiko*, 35 Haw. 608 (1940); *State v. Kahalewai*, 541 P. 2d 1020 (Haw. 1975); *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 550 P. 2d 1001, 130 Cal. Rptr. 465 (1976); *Troy Hills Village v. Township Council*, 68 N.J. 604, 350 A. 2d 34 (1975); *Hutton Park Gardens v. Town Council of the Town of West Orange*, 68 N.J. 543, 350 A. 2d 1 (1975); *Israel v. City Rent and Rehabilitation Administration*, 285 F. Supp. 908 (S.D.N.Y. 1968). The burden of proof is on the Trustees in challenging the constitutionality of duly enacted legislation like Act 185 to prove that the legisla-

tion is arbitrary, capricious and not reasonably related to a proper legislative purpose.

20. The Trustees have failed to disprove the material findings in Section 1 of Act 185 which the Legislature has recited to justify the enactment of Act 185. Therefore, the Court concludes from the unrebutted legislative findings and the evidence presented in this case that the purpose of Act 185 as stated by the Legislature in Section 1 is a legitimate legislative purpose and the enactment of legislation for that purpose is in the public interest:

The Legislature declares it to be the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rent set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms [and] . . . to prevent the imposition of confiscatory economic burdens upon the lessees of residential property . . .

21. The Court also concludes from a complete review of the explicit, unrebutted findings contained in Act 185 and from the evidence presented in this case that it was also the purpose of the Legislature in enacting Act 185 to discourage continued expansion of landowner investments in single-family residential leasehold and to encourage the orderly withdrawal of existing landowner investments in single-family residential leasehold. The Court further concludes from the unrebutted legislative findings and the evidence presented in this case that this is also a proper legislative purpose and that the enactment of legislation for that purpose is in the public interest.

22. The Trustees have failed to prove that Act 185 is arbitrary, capricious and not reasonably related to a proper legislative purpose and, based upon the unrebutted legislative findings and the evidence presented in this case, the Court concludes that the procedures, guidelines and

rent limitations provided for in Act 185 are reasonably related to the legislative purposes stated above.

23. Specifically, there are a number of reasonable justifications for substituting the Hawaii Housing Authority for the panel of three real estate appraisers provided for in the lease: equalize the bargaining power between the parties; expeditious resolution of rent renegotiation disputes; reduction in the expense of lease rent arbitration; and greater uniformity of arbitration decisions. The Trustees have not effectively rebutted any of these justifications.

24. The "owner's basis" definition contained in Act 185 provides a practical, reasonable and equitable method for allocating the current fair market value of an improved leasehold lot between the Trustees and their lessees for the purpose of rent renegotiation.

25. The limitation of annual rent to the amount derived by multiplying the "owner's basis" by 4% contained in Act 185 places a reasonable limitation on the rent to be set on renegotiation that will provide Bishop Estate with a just, fair and reasonable return on their leased-fee interest under the facts presented in this case and with due consideration for the legislative objectives of Act 185.

26. The Trustees allege that Act 185 denies their right to equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the United States Constitution. More particularly, they allege that it is an unconstitutional classification for the Legislature to restrict the coverage of Act 185 to long-term leases on single-family residential property instead of including all types of residential leases on all types of properties. In order to demonstrate a violation of the equal protection clause on this ground, the Trustees have the burden of proving that the classification adopted by the Legislature in Act

185 is irrational or unreasonable. *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

27. The equal protection clause does not require that the Legislature must deal with any problems which may exist with regard to other types of leases or other types of properties. "The equal protection clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 491, 485, 503, 90 S. Ct. 1153, 25 L.Ed.2d 940 (1970). The Trustees have failed to prove that the classification adopted by the Legislature in Act 185 is irrational or unreasonable. Therefore, the Court concludes that the classification adopted by the Legislature in determining the types of leases and the types of properties covered by Act 185 is reasonable and rational.

28. The Trustees have also alleged in their Memorandum in Opposition to Motion for Summary Judgment that Act 185 is discriminatory because its application will be limited to a small group of major landowners who have chosen to make their land available for single-family residential development only under long-term residential leases instead of in fee simple. They rely upon the decision by the United States Supreme Court in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), to support their contention. The Trustees' reliance on that case is misplaced. There the Supreme Court concluded that a statute prohibiting laundries in wooden buildings was really a veiled attempt to discriminate against persons of Chinese ancestry who had to operate their laundries in wooden buildings. Act 185 is not discriminatory on its face and in order to prevail on this allegation, the Trustees have the burden of proving that the purpose behind the legislation was to discriminate against major landowners rather than to provide relief for problems with residential lease rent renegotiation.

29. The Trustees have failed to prove that Act 185 was enacted for the purpose of racial discrimination or for the purpose of discriminating against a small class of major landowners. In fact, the evidence presented in this case proved that the major landowners affected by Act 185 are responsible for development of the residential leasehold system in Hawaii and that the Trustees' past residential leasehold policies have contributed to many of the problems associated with it. Therefore, the Court concludes that Act 185 was enacted by the Legislature for the purposes stated in paragraphs 20 and 21 above and not for the purpose of discriminating against major landowners.

30. Act 185 is not an unconstitutional impairment of the lease contract in violation of Article I, Section 10 of the United States Constitution.

31. Act 185 does not take property without just compensation in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

32. Act 185 does not deny substantive due process in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

33. Act 185 does not deny rights to equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

34. Act 185 is a legitimate exercise of the police power and is constitutional.

35. The determination of the new annual lease rental on renegotiation of such lease under the Tract A leases is to be made in conformity with the applicable provisions of Act 185.

36. The Trustees are to be instructed that it is their responsibility to determine the annual lease rental for the final 30-year period of the term of the Tract A leases under

the terms of the leases and in accordance with the applicable provisions of Act 185.

37. This Court shall enter a declaratory judgment that Act 185, Session Laws of Hawaii 1975, codified in Section 519-2, Hawaii Revised Statutes, as amended, is constitutional and that the rights and obligations of the Trustees and lessees and vendees herein are governed by the provisions of Act 185 and that all the provisions of Act 185 challenged herein are constitutional.

38. This Court holds that Act 185 is applicable to all leases of residential lots, as defined by Act 185, as of June 2, 1975, or entered into thereafter.

39. This Court shall issue instructions herein to the Trustees directing that the determination of the annual lease rent for the final 30-year period of the terms of the leases issued by the Trustees to lessees shall proceed under the terms of the lease and in accordance with the applicable provisions of Act 185.

40. Costs and reasonable attorney's fees are to be taxed.

Dated: Honolulu, Hawaii, June 29, 1978.

H. LUM

Judge of the above entitled Court

Appendix L

United States Court of Appeals
For the Ninth Circuit

No. 80-4368
D.C. No. 79-0096

Frank E. Midkiff, et al.,
Plaintiffs-Appellants,

v.

Paul A. Tom, et al.,
Defendants-Appellees,
and

Wai-Kahala Tract "H" Association, Inc., et al.,
Intervenors-Appellees.

**MEMORANDUM OF AMICUS CURIAE
HERMAN LUM**

HERMAN LUM

Chief Justice Designate and
Acting Administrative Head
of the Judiciary of the
State of Hawaii
P. O. Box 2560
Honolulu, Hawaii 96804

(CERTIFICATE OF SERVICE ATTACHED)

United States Court of Appeals

For the Ninth Circuit

No. 80-4368

D.C. No. 79-0096

Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching,
Matsuo Takabuki and Myron B. Thompson, Trustees of the
Kamehameha Schools/Bishop Estate,
Plaintiffs-Appellants,

v.

Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi,
Wayne T. Takahashi, Lawrence N.C. Ing,
Nobuyoshi Tamura, Andrew I.T. Chang,
and David C. Slipher,
Commissioners of the Hawaii Housing Authority;
Franklin Y.K. Sunn, Executive Director of the Hawaii
Housing Authority; and Hawaii Housing Authority,
Defendants-Appellees,

and

Wai-Kahala Tract "H" Association, Inc.;
Halawa Hills Landsale Committee; Awakea Association;
Alii Shores Community Association;
Enchanted Hills, Unit I; Portlock Community Association
(Maunaloa Beach);
Kokohead Community Lease-Fee, Inc.;
West Marina Community Association;
Kalama Valley Community Association, Inc.;
Maunaloa Triangle-Koko Kai Community Association, Inc.;
Hahalione Valley Community Association, Inc.;
Kamiloiki Community Association;
Lunalilo Marina Community Association;
Mariners Ridge and Cove Fee/Lease
Conversion Committee;
Spinnaker Isle Association;
Waialae Iki Community Association;
Waiau Community Association; Kahala Community
Association, Inc.;
Kahala Community Fee Purchase Fund and
Halawa Valley Estates Fee Conversion Corporation,
Intervenors-Appellees.

MEMORANDUM OF AMICUS CURIAE
HERMAN LUM, ACTING ADMINISTRATIVE
HEAD OF THE JUDICIARY OF THE
STATE OF HAWAII

This amicus curiae memorandum is submitted on behalf of Herman Lum, Chief Justice Designate of the Supreme Court of the State of Hawaii,¹ in his capacity as Administrative Head of the judiciary of the State of Hawaii, opposing the issuance of federal injunctive relief against state court proceedings in the instant case.

A. INTEREST OF THE AMICUS CURIAE

As Chief Justice Designate of the Supreme Court of the State of Hawaii, amicus curiae Herman Lum is the Administrative Head of the state's judicial system. He is thus required by the state constitution and state statute to uphold the independence and sovereignty of the judiciary of the State of Hawaii. See Haw. Const. art. VI, § 6, Haw. Rev. Stat. §§ 601-2(a) and 2(b)(6). He is also responsible for the orderly processing of pending cases in the state court system and in charge of fiscal expenditures for the judiciary.

Initially, amicus curiae Herman Lum wishes to note that he does not appear here in his capacity as Chief Justice Designate of the Hawaii Supreme Court, and is not concerned with the merits of the case recently decided by the Ninth Circuit Court of Appeals in *Midkiff v. Tom*, No. 80-4368 (9th Cir. March 28, 1983). Rather amicus curiae appears as Acting Administrative Head of the judiciary of the State of Hawaii. In this capacity, amicus wishes to express his concern with this court's issuance of a temporary restraining order halting all state proceedings in-

¹Herman Lum was senior Associate Justice of the Hawaii Supreme Court upon his nomination by the Governor of Hawaii to be Chief Justice. The state senate has confirmed the nomination, and his swearing-in as Chief Justice is scheduled for April 26, 1983.

volving the same cause of action. Specifically, amicus submits that the issuance of any injunctive relief by this federal appellate court with regard to the ongoing state court proceedings is in conflict with the spirit if not the letter of the Anti-Injunction Act, 28 U.S.C. § 2283, violates the principles of "Our Federalism," and would have a serious adverse effect on the independence and practical day-to-day operations of Hawaii's state judicial system.

B. QUESTION PRESENTED

The sole question this memorandum will discuss is whether any injunctive relief should be issued in the present case to stay ongoing state court proceedings.

C. STATEMENT OF FACTS

I. Overview of Cases in Hawaii Courts Addressing Constitutionality of State Leasehold Land Reform Legislation

A. The Bishop Estate's 1975 Declaratory Judgment Action (*Midkiff v. Amemiya*); Appeal to Hawaii Supreme Court; Dismissal of Constitutional Issues by Motion of the Bishop Estate in 1982.

On December 29, 1975 the Trustees of the Estate of Bernice Pauahi Bishop (hereinafter, "Bishop Estate" or "Trustees") filed a Complaint for Declaratory Judgment and Instructions in the Circuit Court of the First Circuit (*Midkiff v. Amemiya*, Civ. No. 47103). The action sought primarily a declaration on the constitutionality of Act 185 (1975) relating to leasehold rental negotiations and mandatory arbitration of disputes by the Hawaii Housing Authority. Defendants included the Hawaii Housing Authority and the lessees of certain residential lots in the Bishop Estate's Waialae Neighborhood Subdivision in Honolulu. Trial was held in July 1977.³ The trial court

³The trial, without a jury, was before then Circuit Judge Herman Lum.

upheld the constitutionality of the Act, issuing extensive findings of fact and conclusions of law on June 29, 1978. The Bishop Estate filed notices of appeal to the Hawaii Supreme Court on December 27, 1978 and January 9, 1979. (One month later, on February 9, 1979, the Bishop Estate commenced federal litigation by filing the complaint in *Midkiff v. Tom*, Civ. No. 79-0096 (D. Hawaii)). The record on appeal was docketed in the Hawaii Supreme Court on March 27, 1979 (No. 7294). After a lengthy briefing process the appeal was set to be argued before the supreme court on January 14, 1982. However on January 8, 1982 the court approved a motion filed that day by the lessees (accompanied by statements of no objection from the other parties) to postpone oral argument indefinitely in light of settlement negotiations. On April 7, 1982 the Bishop Estate filed a "Motion for Partial Dismissal of Appeal . . . on Grounds of Mootness", seeking to dismiss the constitutional issues from the appeal on the grounds that the Trustees had settled with all lessees in the action and that therefore the constitutional issues were now moot as between all real parties in interest. By order filed April 14, 1982 the supreme court granted the Bishop Estate's motion and reset for argument the sole remaining issue of attorneys' fees. That issue was subsequently resolved by memorandum opinion.

B. State Condemnation Actions Brought by the Hawaii Housing Authority; Interlocutory Appeals to the Hawaii Supreme Court on the Constitutionality of the Land Reform Act (*Castle and Brown* cases); Remand for Further Trial on Public Use Issue.

Numerous condemnation actions have been filed by the Hawaii Housing Authority pursuant to the Land Reform Act. Approximately 30 cases are currently scheduled for trial.

Under the provisions of Hawaii's general condemnation law, any party in a condemnation action may move for an "immediate trial, without a jury" on the issue of whether condemnation is for a "public use"; and an "interlocutory appeal . . . as a matter of right" lies from the trial court's ruling on the public use issue. Hawaii Rev. Stat. § 101-34. Pursuant to this section the lessee-defendants in *Hawaii Housing Authority v. Castle*, 65 Hawaii, 653 P.2d 781 (1982), appealed to the Hawaii Supreme Court from the trial court's finding that a condemnation under the Land Reform Act is for a public use. The supreme court stated, 65 Hawaii at, 653 P.2d at 782-83:

We are . . . being called upon to pass upon two questions of vast public import, i.e. whether a taking by eminent domain under the provisions of Chapter 516, HRS, is a "public use" within the meaning of . . . the Fifth Amendment to the Constitution of the United States and . . . Article I of the Constitution of the State of Hawaii.

Further, in a reference to Judge King's decision in *Midkiff v. Tom*, the *Castle* court implied that, even if Judge King's finding of a valid public use under the federal constitution is upheld in the higher federal courts, the Hawaii Supreme Court still will have to decide the question whether "public use" in the Hawaii constitution should be differently and more strictly construed. The *Castle* court stated:

Appellee HHA filed in the court below . . . the decision of the United States District Court for the District of Hawaii in a different case involving a different landowner. . . . [T]he decision of the United States District Court in question (which we understand is presently on appeal) may have precedential value with respect to the Constitution of the United States, but has no binding effect on us with respect to the Constitution of the State of Hawaii.

65 Hawaii at, 653 P.2d at 782. The *Castle* court ultimately concluded that the lower court record in that case was inadequate for purposes of deciding such major constitutional issues of first impression, and accordingly the case was remanded for a full trial on the public use issue.

In a similar interlocutory appeal raising the issue of public use under both the federal and state constitutions, the supreme court by unpublished memorandum opinion filed the same day as the *Castle* opinion remanded for further trial of the public use issue. *Hawaii Housing Authority v. Brown* (Civ. No. 60945, Sup. Ct. No. 8489).

The supreme court's opinions in *Castle* and *Brown* were issued on November 10, 1982. The public use trials for those cases have not yet commenced. However, in light of *Castle* and *Brown* the trial court in Civ. No. 63408, *Hawaii Housing Authority v. Midkiff*, determined that a trial on public use was required in that case. Such trial commenced in No. 63408 on March 14, 1983.

II. Effect of the Instant Temporary Restraining Order on the Trial in Civ. No. 63408, *Hawaii Housing Authority v. Midkiff*; Withdrawal of the Ancillary Extraordinary Writ Proceeding in the Hawaii Supreme Court (No. 9208, *Midkiff v. Greig*).

The Ninth Circuit's temporary restraining order effectively restrained the on-going public use trial in No. 64308, *Hawaii Housing Authority v. Midkiff*.

The complaint in No. 64308 had been filed on November 10, 1980. Defendant Bishop Estate had moved unsuccessfully for summary judgment on constitutional grounds, including public use arguments. In the fall of 1982 a jury trial on valuation was held over a period of several weeks, and the verdict was announced on November 3, 1982. One week later, as described *supra*, the supreme court's opin-

ions in *Castle* and *Brown* were issued, and the trial court in No. 64308 therefore ordered further proceedings on the public use issue. The public use trial commenced on March 14, 1983, litigating public use under both the federal and state constitutions as contemplated by *Castle*. Upon issuance of the Ninth Circuit's opinion in *Midkiff v. Tom* on March 28, 1983, the Bishop Estate asked the trial court in No. 64308 (Judge Greig) to stay its proceedings. Judge Greig denied a stay.

On April 4, 1983, the Bishop Estate filed in the Hawaii Supreme Court a Petition for Writ of Prohibition or for Writ of Mandamus (No. 9208; *Midkiff v. Greig*), seeking to prohibit the trial court from taking further action in No. 63408. Accompanying the petition was an "Ex Parte Motion for Temporary Stay." The petition and motion contended that the ongoing public use trial should be stopped immediately in light of the Ninth Circuit's opinion. More specifically, the petition briefly argued (1) that further trial proceedings were barred by *res judicata*; (2) that a stay would alleviate Petitioners' heavy trial expenses; (3) that "A Stay Will Prevent the Possible Divestiture of Trustees' Property Under the Provisions of a Law . . . Declared Unconstitutional"; and (4) that a stay would avoid duplicative or inconsistent adjudications. On April 6, 1983, two days after the filing of the petition and motion, the lessee defendants filed a memorandum in opposition to the "ex parte" motion, *inter alia* informing the supreme court that the Ninth Circuit on April 5, 1983 had issued a temporary restraining order effectively barring further prosecution of the trial in No. 63408. On April 7, 1983, prior to any action by the supreme court in the proceeding, the Bishop Estate withdrew the petition and motion, without prejudice to possible future renewal of the proceeding. The withdrawal documents were accompanied by brief affidavits stating that Judge Greig had recessed the trial in question until April 25, 1983 and that therefore the writ

and temporary stay were no longer necessary. In fact, the trial in No. 63408 had been brought to a halt by the Ninth Circuit's action.

D. ARGUMENT

I. *The Anti-Injunction Act*

Any discussion of the power and propriety of federal courts issuing injunctive relief against state court proceedings must begin with the Anti-Injunction Act, 28 U.S.C. § 2283. As one respected treatise has noted: "For almost as long as there have been federal courts, there has been a statutory prohibition against injunctions from federal courts restraining state court proceedings." 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4221 (1978). That statutory prohibition states:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283.

The Anti-Injunction Act is clearly applicable to the instant case, since the state court proceedings in *Hawaii Housing Authority v. Midkiff*, Civ. No. 63408, were already under way when the federal temporary restraining order was issued. The question then becomes whether any of the three exceptions delineated in the Act is also applicable. The third exception—"to protect or effectuate its judgments"—appears to be the only possibility, since the "Congressional authorization" exception is not relevant, and the "necessary in aid of its jurisdiction" exception does not permit the issuance of federal injunctive relief against state court proceedings "merely because those proceedings interfere with a protected federal right . . . , even when the interference is unmistakably clear." *Atlantic Coast Line*

Railroad Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 294 (1970).

It is true that the purpose behind the Act's third exception is to prevent the relitigation of matters which have already been fully adjudicated by a federal court. See 22 U.S.C. § 2283 (Reviser's Note). It is equally true, however, that having the power to stay state court proceedings under this third exception does not mean having to always exercise such power. Besides the "principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding," *Mitchum v. Foster*, 407 U.S. 225, 243 (1972), the federal court must initially determine whether the usual equitable requirements of irreparable harm and lack of any adequate remedy at law are met. See generally *Younger v. Harris*, 401 U.S. 37, 43-44 (1971).

It is the position of amicus curiae that these equitable requirements, difficult enough to meet in the usual case, must be even more tightly construed where the injunctive relief would cross state-federal judicial lines. Amicus will not here discuss whether the equitable requirements are present in the instant case, but will note that the United States Supreme Court has declared that "[a]ny doubt as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. at 297.

Perhaps even more important than the language and long existence of the Anti-Injunction Act, however are the principles and policies behind it. The Supreme Court has observed that "the consistent understanding has been that its basic purpose is to prevent 'needless friction between state and federal courts.'" *Mitchum v. Foster*, 407 U.S.

at 232-33 (quoting *Oklahoma Packing Co. v. Gas & Electric Co.*, 309 U.S. 4, 9 (1939)). This "basic purpose" is one shared by the abstention doctrine,³ and fueled by the concept commonly known as "Our Federalism."

II. "Our Federalism"

The concept of "Our Federalism" may well be as old as the Republic itself, but it was not fleshed out until 1971, when the United States Supreme Court held that federal courts may not interfere with ongoing state criminal proceedings. As Justice Black wrote for the majority in *Younger v. Harris*:

What the concept . . . represent[s] is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

401 U.S. 37, 44 (1971).

The Court in *Younger* also described the concept of "comity" as

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id.

³Amicus is not here concerned with whether the federal courts should have abstained from passing on the merits of the instant dispute. Amicus' concern is limited to the question of whether our state courts should be precluded from entertaining and resolving the same dispute. This is where amicus believes the principles and policies underlying and shared by the Anti-Injunction Act and the abstention doctrine are relevant and compelling.

Whether called "Our Federalism" or "comity," the overriding consideration of the Supreme Court in *Younger* and its progeny is clear: avoiding unnecessary federal interference with the state judicial process. See, e.g., *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). It is a fundamental consideration which, amicus submits, is sufficiently compelling in the instant case to preclude the issuance of any federal injunctive relief against ongoing state court proceedings.

III. *Administrative Concerns of the State Judiciary*

In addition to the basic principles common to the Anti-Injunction Act and "Our Federalism," the instant case involves administrative problems of a more practical, but just as important, nature. For one thing, an injunction now could eventually disrupt the orderly processing of pending cases in our state court system involving the same subject matter, of which about thirty are already scheduled for trial. Needless to say, that would work a substantial hardship on our court calendars, which in turn would directly affect the efficiency of our state judicial system. Moreover, the instant parties, other parties similarly situated, and the Hawaii state court system have already spent an enormous amount of time, expense, and manpower addressing the precise issues decided by the Ninth Circuit in *Midkiff v. Tom*. And finally, in the event the United States Supreme Court eventually upholds the Hawaii Land Reform Act under the federal constitution, there would have to be a retrial in the ongoing state court proceeding and a decision on the merits by the Hawaii Supreme Court with respect to the state constitutional issues.

Injunctive relief is an equitable remedy and thus an extraordinary one; it is even more so when issued by a federal court against ongoing state court proceedings. Inasmuch as it would also constitute a serious interference with the effective operations and independence of Hawaii's

state judiciary, which amicus is bound to administer and uphold, amicus curiae submits that such injunctive relief is unnecessary and unwarranted in the instant case.

E. CONCLUSION

For the reasons stated above, amicus curiae Herman Lum, Chief Justice Designate and Acting Administrative Head of the judiciary of the State of Hawaii, opposes the issuance of federal injunctive relief in this case against ongoing state court proceedings.

DATED: Honolulu, Hawaii, April 12, 1983.

Respectfully submitted,

H. LUM

HERMAN LUM

Chief Justice Designate and
Acting Administrative Head
of the Judiciary of the
State of Hawaii

Appendix M

**United States Court of Appeals
For the Ninth Circuit**

No. 80-4368

**Frank E. Midkiff, et al.,
Plaintiffs-Appellants,**

vs.

**Paul A. Tom, et al.,
Defendants-Appellees.**

[Filed June 17, 1983]

ORDER

**Before: ALARCON, FERGUSON and POOLE, Circuit
Judges.**

A majority of the panel in the above case has voted to deny the petition for rehearing and to reject the suggestion for the appropriateness of rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and a majority of the judges of the court in regular active service have voted not to grant rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The Joint Motion to Withdraw the Petition for Rehearing and Suggestion for Rehearing En Banc is dismissed as moot.

The several Notices of Withdrawal of the above Joint Motion are dismissed as moot.

Appendix N

United States Court of Appeals
For the Ninth Circuit

No. 80-4368, DC CV 79-0096 SK

Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching,
Matsuo Takabuki and Myron B. Thompson, Trustee
of the Kamehameha Schools/Bishop Estate,
Plaintiffs/Appellants,

vs.

Paul A. Ton, Tony Taniguchi, Wilbert K. Eguchi,
Wayne T. Takahashi, et al.,
Defendants/Appellees,

and

Wai-Kahala Tract "H" Association, Inc.,
Halawa Hills Landsale Committee;
Awakea Association; et al.,
Intervenors/Appellees.

JUDGMENT

Appeal from the United States District Court for the
District of Hawaii (Honolulu).

This cause came on to be heard on the Transcript of the
Record from the United States District Court for the Dis-
trict of Hawaii (Honolulu) and was duly submitted.

On consideration whereof, it is now here ordered and ad-
judged by this Court, that the judgment of the said District
Court in this Cause be, and hereby is reversed and re-
manded.

Filed and entered March 28, 1983.

Appendix O

No. 80-4368

United States Court of Appeals
For the Ninth Circuit

Frank E. Midkiff, et al.,
Plaintiffs-Appellants,

vs.

Paul A. Tom, et al.,
Defendants-Appellees,

and

Wai-Kahala Tract "H" Association, et al.,
Intervenors-Appellees.

[Filed July 15, 1983]

Notice of Appeal
and
Certificate of Service

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United States Court of Appeals
For the Ninth Circuit

Frank E. Midkiff, et al.,
Plaintiffs-Appellants,

vs.

Paul A. Tom, et al.,
Defendants-Appellees,

and

Wai-Kahala Tract "H" Association, et al.,
Intervenors-Appellees.

NOTICE OF APPEAL

The State of Hawaii and the Hawaii Housing Authority and Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoshi Tamura, Andrew I.T. Chang, and David C. Slipher, Commissioners of the Hawaii Housing Authority, Franklin Y.K. Sunn, Executive Director of the Hawaii Housing Authority, Defendants-Appellees in *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), hereby appeal from the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case dated March 28, 1983, under 28 U.S.C. § 1254 (2). Rehearing and rehearing *en banc* were denied in this case on June 17, 1983.

Dated: Honolulu, Hawaii, July 14, 1983.

/s/ Laurence H. Tribe
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Special Deputy Attorney General
Michael A. Lilly
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Attorneys for
Defendants-Appellees

Certificate of Service

I hereby certify that true and correct copies of the foregoing document were duly mailed on July 14, 1983, to the attorneys of record.

Dated: Honolulu, Hawaii, July 14, 1983.

/s/ Laurence H. Tribe

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A-263

Appendix P

No. 80-4368

United States Court of Appeals
for the Ninth Circuit

U.S. District Court for the District of Hawaii

Civil No. 79-0096

Frank E. Midkiff, et al.,
Plaintiff-Appellant,

vs.

Paul A. Tom, et al.,
Defendants-Appellees,
and
Wai-Kahala Tract "H" Association, et al.,
Intervenors-Appellees.

[Filed July 15, 1983]

Appeal from Final Judgment

Notice of Appeal to the Supreme Court
of the United States

Certificate of Service

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ciation, Inc.**

A-265

No. 80-4368

United States Court of Appeals
for the Ninth Circuit

U.S. District Court for the District of Hawaii
Civil No. 79-0096

Frank E. Midkiff, et al.,
Plaintiff-Appellant,
vs.

Paul A. Tom, et al.,
Defendants-Appellees,
and

Wai-Kahala Tract "H" Association, et al.,
Intervenors-Appellees.

Appeal from Final Judgment

Notice of Appeal to the Supreme Court
of the United States

Notice is hereby given that Portlock Community Association (Maunaloa Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Association; and Hahaione Valley Community Association, Inc., Intervenors-Appellees above named, hereby appeal to the Supreme Court of the United States from the judgment entered in this action on March 28, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated: Honolulu, Hawaii, July 14, 1983.

/s/ Corey Y. S. Park
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Certificate of Service

I hereby certify that on this date I caused a true and correct copy of the foregoing to be served on the following by having said copy deposited in the United States mail, postage prepaid, addressed as follows:

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Dated: Honolulu, Hawaii, July 14, 1983

/s/ Corey Y. S. Park

Appendix Q

**In the United States Court of Appeals
For the Ninth Circuit**

No. 80-4368

USDC Civil No. 79-0096

**Frank E. Midkiff, et al.,
Plaintiffs-Appellants,**

vs.

**Paul A. Tom, et al.,
Defendants-Appellees,**

and

**Wai-Kahala Tract "H" Association, Inc., et al.,
Intervenors-Appellees.**

[Filed July 19, 1983]

**Notice of Appeal to the Supreme Court
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(Certificate of Service Attached)

**In the United States Court of Appeals
For the Ninth Circuit**

No. 80-4368

USDC Civil No. 79-0096

**Frank E. Midkiff, et al.,
Plaintiffs-Appellants,**

vs.

**Paul A. Tom, et al.,
Defendants-Appellees,**

and

**Wai-Kahala Tract "H" Association, Inc., et al.,
Intervenors-Appellees.**

**Notice of Appeal to the Supreme Court
of the United States**

Notice is hereby given that the Kahala Community Assn., Inc., et al., Intervenors-Appellees in this case, hereby appeal to the Supreme Court of the United States from the Judgment of the United States Court of Appeals for the Ninth Circuit entered March 28, 1983, rehearing denied by order dated June 17, 1983, reversing the Judgment of the United States District Court for the District of Hawaii entered June 10, 1980.

Frank E. Midkiff, et al., vs. Paul A. Tom, et al.,

No. 80-4368

**Notice of Appcal to the Supreme Court of the United
States**

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated: Honolulu, Hawaii, July 18, 1983.

/s/ A. Bernard Bays

James H. Case

A. Bernard Bays

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Attorneys for Intervenors-

**Appellees Kahala Community
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Certificate of Service

I hereby certify that a copy of the within was duly served upon each of the following attorneys and/or parties by hand delivering said copy on July 18, 1983 addressed as follows:

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Dated: Honolulu, Hawaii, July 18, 1983.

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